

**Female Genital Mutilation as the Basis for Refugee Status: A Particularised Form
of Domestic Violence**

Volume 1 of 1

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I confirm that the word count of this thesis is less than 100,000 words excluding the title page, contents acknowledgements, summary or abstract, abbreviations, footnotes, diagrams, maps, illustrations, tables, appendices, and references or bibliography.

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Abstract

This thesis seeks to redress the inconsistent and inadequate treatment of gender-based claims for refugee status by decision-makers, focusing exclusively on the controversial cultural practice of Female Genital Mutilation (FGM). Drawing upon the experiences of the UK, Canada and the US, argument is made that if FGM-based refugee claims were subjected to the protective processes implemented within specialised domestic violence courts, the refugee determination process (RDP) would be more inclusive and accommodating of the needs of claimants in a similar fashion to the approach taken in respects of domestic violence. To this end, the thesis argues that culturally recognized practices do not lose their criminal label just because some people demand that they be labelled as such. Secondly, it allows us to examine the protective functions of specialised domestic violence courts and programme for victims and how that shift in attitudes and practices might be replicated or mirrored in some shape or form within the RDP. The examined jurisprudence has revealed that the task of defining a just, humanitarian standard for a grant of refugee status in FGM cases is complex. Coupled with procedural and evidential barriers, in an era where States have tightened border controls, FGM claimants face great challenges in obtaining refugee status. The thesis reveals that the RDP is failing to meet the challenging claims brought by women, and that claimants are let down, both by an extremely poor standard of decision-making and by a non-gendered RDP. It contributes to the literature on FGM, particularly in respect of its categorization as a gender-based form of violence within the RDP. The thesis proposes several recommendations to potentially make the RDP gender-sensitive and accommodating for FGM claimants. Whilst the therapeutic objectives underpinning the specialised domestic violence courts cannot be directly transposed into the refugee determination context, lessons and best practices from these courts can help to inform a realistic and reasoned view on promoting a gendered partnership approach within the RDP.

Abbreviations

Affirmance without Opinion (AWO)

Asylum and Immigration Tribunal (AIT)

Board of Immigration Appeal (BIA)

Canada Border Services Agency (CBSA)

Centre for Gender and Refugee Studies (CGRS)

Citizenship and Immigration Canada (CIC)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Convention on the Rights of the Child (CRC)

Country of Origin Information (COI)

Country of Origin Service (COIS)

Crown Prosecution Service (CPS)

Derbyshire Criminal Justice Board (DCJB)

Department of Homeland Security (DHS)

Declaration on the Elimination of Violence Against Women (DEVAV)

Derby Dedicated Domestic Violence Court (DDDVC)

Domestic Violence Justice Strategy (DVJS)

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

European Court of Human Rights (ECtHR)

European Union (EU)

Executive Office for Immigration Review (EOIR)

Female Genital Mutilation (FGM)

House of Lords (UKHL)

Immigration Appeals Tribunal (IAT)

Immigration and Nationality Act (INA)

Immigration and Naturalization Service (INS)

Immigration Refugee Board (IRB)
 Immigration and Refugee Protection Act 1991 (IRPA)
 Independent Domestic Violence Advocates (IDVA)
 Information Technology (IT)
 Ineffective assistance of counsel (IAC)
 Internal Flight Alternative (IFA)
 International Covenant on Civil and Political Rights (ICCPR)
 International Covenant on Economic, Social, and Cultural Rights (ICESCR)
 International Criminal Court (ICC)
 International Criminal Tribunals for Rwanda (ICTR)
 International Criminal Tribunals for the former Yugoslavia (ICTY)
 International Refugee Organisation (IRO)
 Leeds Domestic Violence Cluster Court (LDVCC)
 National Organization for Women (NOW)
 New Asylum Model (NAM)
 Non-Governmental Organisation (NGO)
 Particular Social Group (PSG)
 Post-traumatic stress disorder (PTSD)
 Reasons for Refusal Letter (RFRL)
 Refugee Determination Process (RDP)
 Refugee Women's Resource Project (RWRP)
 The Dade County Domestic Violence Court (DCDVC)
 Universal Declaration on Human Rights (UDHR)
 United Kingdom (UK)
 United Kingdom Border Agency (UKBA)
 United Kingdom Immigration Appeal Authority (IAA)
 United Nations (UN)
 United Nations Children's Fund (UNICEF)
 United Nations High Commissioner for Refugee Status (UNHCR)
 United States (US)
 United States Citizenship and Immigration Services (USCIS)

United States Department of Justice (DOJ)

Universal Declaration on Human Rights (UDHR)

Victim/witness assistance programme (VWAP)

West London Specialised Domestic Violence Court (WLSDVC)

Witness Services (WS)

World Health Organisation (WHO)

Declaration

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Introduction

I. Background and Summary of Thesis

Domestic refugee status determination procedures have often been criticised for producing inconsistent decisions; according to the literature it has become almost common for the phrases ‘refugee roulette’ or ‘asylum lottery’ to be employed by those who perceive that the outcomes of decisions on refugee claims differ widely irrespective of their essential similarities.¹ In fact, Corien Jonker, Chair of the Council of Europe Parliamentary Assembly Migration and Refugee Committee in 2009 stated that “poor quality decision-making and inconsistency of asylum decisions result in unfairness and suffering for asylum seekers. It creates an “asylum lottery” and is an affront to the rule of law”.² Such inconsistency may itself be bad enough because it undermines an inherent aspect of our sense of justice – that like cases be treated alike. It can also generate further concerns: if a decision-making process produces disparate outcomes, then surely some of its decisions must also be substantively incorrect, either because genuine claims have been rejected and/or non-genuine claims accepted. Various reasons may be proffered as to why such inconsistencies arise: the inherent difficulties of the asylum decision problem; difficulties in determining credibility; the number of decision-makers required; the inherent personal bias of decision-makers; the quality or lack of training and expertise among decisions-makers; the different accounts and quality of evidence relied upon; and the scope for differential assessments as to whether or not such evidential material establishes risk on return to a country of origin. Given the potential scope for inconsistency

¹ See, Prasad R, “*The Asylum Lottery*”, The Guardian, 25 January 2002. For a detailed empirical study of inconsistent decision-making see, Ramji-Nogales J, *et al*, “*Refugee Roulette: Disparities in Asylum Adjudication*”, 60 Stanford Law Review 457, (2007); Immigration Advisory Service, “*The Refugee Roulette: The Role of Country Information in Refugee Status Determination*”, (2010), available online via the UNHCR Ref World website at <http://www.unhcr.org/refworld/docid/4b62a6182.html>, (last accessed 29/12/16).

² Council of Europe, Press Release 493, (2009) (noting the comments of Corien Jonker). This release is available online via the Council of Europe website at <https://wcd.coe.int/ViewDoc.jsp?id=1462649&Site=DC> (last accessed 1/2/17).

in refugee determination, debate has tended to focus on what, if anything can be done to reduce, or at least, ameliorate the risk of it.³

II. Purpose, Aim and Significance

The aim of this thesis is therefore to redress the inconsistent and inadequate treatment of gender-based claims for refugee status by decision-makers, focusing exclusively on the controversial cultural practice of Female Genital Mutilation (FGM).⁴ As a recognised human rights violation,⁵ the nature and incidence of FGM is overwhelming.⁶ The practice involves the partial or complete removal of the external female genitalia for non-medical

³ Thomas R, “*Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom*”, 20 International Journal of Refugee Law 489, (2008), at 489; Ramji-Nogales, *supra* note 1, at 378-89; Legomsky S, “*Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*”, 60 Stanford Law Review 413, (2007), at 413-74; Taylor M, “*Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication*”, 60 Stanford Law Review 475, (2007), at 475-501.

⁴ Hereafter referred to as FGM. For a comprehensive overview of FGM please refer to, UN High Commissioner for Refugees (UNHCR), “*Too Much Pain: Female Genital Mutilation & Asylum in the European Union - A Statistical Overview*”, (2013), available online at <http://www.refworld.org/docid/512c72ec2.html> (last accessed 10/2/16).

⁵ FGM is a form of violence committed against women and girls which is in itself both a cause and consequence of gender inequality. FGM has been documented as discrimination based on sex because it is rooted in gender inequalities and power imbalances between men and women and inhibits women’s full and equal enjoyment of their human rights. It is a form of violence against girls and women, with physical and psychological consequences. It deprives girls and women from making an independent decision about an intervention that has a lasting effect on their bodies and infringes on their autonomy and control over their lives. See, WHO, “*Violence Prevention: Promoting Gender Equality to Prevent Violence against Women*”, (2009). This document is available online at http://apps.who.int/iris/bitstream/10665/44098/1/9789241597883_eng.pdf (last accessed 10/7/17) and WHO, “*Eliminating Female Genital Mutilation: An Interagency Statement*”, (2008), at 10. This document is available online at http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf (last accessed 11/7/17).

⁶ Conroy M, “*Refugees Themselves: The Asylum Case for Parents of Children at Risk of Female Genital Mutilation*”, 22 Harvard Human Rights Journal 109, (2009), at 110. For further information on the origins of FGM see, Daly C, “*The Psychobiological Origins of Circumcision*” 31 International Journal of Psychoanalysis 217, (1950), at 217-36; Lockhat H, “*Female Genital Mutilation: Treating the Tears*”, Middlesex University Press: Hampshire, (2004); Bilotti E, “*The Practice of FGM*”, USA: Lexington, MA, (2000); Shandall A, “*Female Circumcision and Infibulation of Females*” 5 Sudan Medical Journal 178, (1967), at 178-211; Hosken F, “*The Hosken Report*” (4th ED), Women’s International Network News: Lexington, MA.

reasons.⁷ The age at which FGM is carried out varies.⁸ The procedure may be carried out shortly after birth, during childhood or adolescence, just before marriage or during a woman's first pregnancy.⁹ The practice often results in lifelong health problems,¹⁰ increased risks during childbirth, psychological trauma,¹¹ and even death.¹² Often rationalised as a rite of passage into womanhood, FGM is an extreme form of violence used to control female sexuality.¹³ It involves a mixture of religious,¹⁴ cultural and social

⁷ Female Genital Mutilation: WHO/UNICEF/UNFPA Statement. Geneva, World Health Organization, 1997. See also, WHO, "Eliminating Female Genital Mutilation: An Interagency Statement", *supra* note 5 at 1.

⁸ See, Razors Edge, "The Controversy of Female Genital Mutilation: When culture harms the girls - the globalisation of female genital mutilation" (March 2005), available online via the IRIN website at <http://www.irinnews.org/InDepthMain.aspx?InDepthId=15&ReportId=62462> (last accessed 21/11/16). See also, Cardenas A, "Female Circumcision: The Road to Change" 26 Syracuse Journal of International Law and Commerce 291, (1999), at 295.

⁹ HM Government, "Multi-agency Practice Guidelines: Female Genital Mutilation", (2016), at 8. This document is available online at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/512906/Multi_Agency_Statutory_Guidance_on_FGM_-_FINAL.pdf (last accessed 10/7/17). See also, See, Razors Edge, *supra* note 8; Toubia N, "Female Circumcision as a Public Health Issue" 331 New England Journal of Medicine 712, (1994), at 712-16; Dorkenoo E, "Cutting the Rose: Female Genital Mutilation- The Practice and its Prevention" Minority Rights Publications: London, (1994), at 10-13; Trueblood L, "Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory" 28 Denver Journal of International Law and Policy 437, (2000), at 442.

¹⁰ Lewis H, "Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide" 8 Harvard Human Rights Journal 1, (1995), at 13. See also, HM Government, "Multi-agency Practice Guidelines: Female Genital Mutilation", *supra* note 9, at 8-11; Dorkenoo, *supra* note 9, at 14; Chalmers B & Hashi KO, "Somali Women's Birth Experiences in Canada after Earlier Female Genital Mutilation", 27 Birth 227, (2000), at 227-234 & Talle A, "Transforming women into 'pure' agnates: aspects of female infibulation in Somalia", in BrochDue V, Rudie I, Bleie T, eds, "Carved Flesh, Cast Selves: Gender Symbols and Social Practices", Berg: Oxford, (1993), at 83-106.

¹¹ Obermeyer CM, "The Consequences of Female Circumcision for Health and Sexuality: An Update on the Evidence", 7 Culture, Health and Sexuality 443, (2005), at 443-461. See also, Wellerstein J, "In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation" 22 Loyola of Los Angeles International and Comparative Law Review 99, (2000), at 108; Cardenas, *supra* note 8, at 297; Dorkenoo, *supra* note 9, at 24-27; Rahman A & Toubia N, "Female Genital Mutilation: A Guide to Laws and Policies Worldwide" Zed Books Ltd: New York, (2000), at 9; Trueblood, *supra* note 9, at 443.

¹² It is impossible to estimate the number of deaths resulting from female circumcision largely due to the fact that the majority of these procedures take place in rural areas where death records are not kept, and since the nature of the procedures requires that unsuccessful attempts be concealed from strangers and health authorities, only a very small proportion of cases reach hospital. Nevertheless, hospital staff in all the areas concerned are very familiar with last-minute and often hopeless attempts to save bleeding, terrified little girls. Those who perform the procedures are protected by the community. Invariably when death or infection results they are attributed to witchcraft and, not to the operator or the fact that their instruments were non-sterile. See also, Razors Edge, *supra* note 8.

¹³ Crawley H, "Refugees and Gender: Law and Process" Jordan Publishing Limited: Bristol, (2001), at 176.

¹⁴ The majority of communities, which practice FGM, believe that the procedure is an approved religious practice of Islam. In reality, the procedure is a cultural, not a religious practice, which actually predates the arrival of both Christianity and Islam in Africa. In Africa, the procedure is performed by Christians (Catholics, Protestants, and Copts), Jews, Muslims, Animists, and atheists, although the practice does not exist in the teachings of any formal religions. For further information on the religious underpinning and

traditions¹⁵ associated with preparing for adulthood and marriage,¹⁶ and ideal of community, modesty and fidelity.¹⁷

It is estimated that more than 200 million women and girls alive today have undergone FGM in countries where the practice is concentrated.¹⁸ Furthermore, there are an estimated 3 million girls at risk of undergoing FGM every year. Most instances of FGM occur in Africa, Asia and the Middle East,¹⁹ but FGM is also practiced in Australia, Europe, Latin America, New Zealand and North America.²⁰

justification of FGM see, Gruenbaum E, “Sexuality issues in the movement to abolish female genital cutting in Sudan”, 20 *Medical Anthropology Quarterly*, 121, (2006); Dellenborg L, “A Reflection on the Cultural Meanings of Female Circumcision: Experiences from Fieldwork in Casamance, Southern Senegal”, in Arnfred, S, ed., “Re-thinking sexualities in Africa” Uppsala, Nordic Africa Institute, (2004), at 79-98; WHO, “Eliminating Female Genital Mutilation: An Interagency Statement”, *supra* note 5, at 6; Cutner L, “Female Genital Mutilation” 40 (7) *Obstetrical and Gynaecological Survey*, 437, (1985), at 438; Walker A & Parmar P, “Warrior Marks: Female Genital Mutilation and the Sexual Binding of Women” Harcourt: San Diego, (1996), at 325 & Abdalla R, “Sisters in Affliction: Circumcision and Infibulation of Women in Africa” Lawrence Hill & Co: Connecticut, (1982), at 84.

¹⁵ Beliefs surrounding FGM often run very deep and may appear illogical to outsiders. For example, African animist beliefs surrounding the practice have been dismissed simplistically as mere superstitions, whereas deeper analysis points to a complex set of ideas which underpin a social system. Some cultures, such as the Bambara and the Doga in Mali and the Mossi of Burkina Faso believe that FGM is necessary, firstly, because it will enhance fertility, and secondly because they believe that if a baby’s head touches the clitoris during childbirth, the baby will die. See, Dorkenoo, *supra* note 9, at 34. In other areas, most notably Ethiopia, tribes believe that if the clitoris is not removed, it will grow and dangle between the legs, like the male genitalia. Coello I, “Female Genital Mutilation: Marked by Tradition” 7 *Cardozo Journal of International and Comparative Law* 213, (1999), at 215. In the Sudan, it is also believed that women are naturally polluted, and can only be cleansed, and suited for marriage and childbirth, by being excised. For further information on the myths surrounding FGM, see, Assaad M, “Female Circumcision in Egypt: Social Implications, Current Research, and Prospects for Change” 11 *Studies in Family Planning* 1, (1980); Slack A, “Female Circumcision: A Critical Appraisal” 10 *Human Rights Quarterly* 437, (1988), at 447 & Dorkenoo E & Elworthy S, “Female Genital Mutilation: Proposals for Change” (3rd ED), Minority Rights Group International: London, (1992), at 9.

¹⁶ See, Dellenborg, *supra* note 14, at 79-98 & Gruenbaum, *supra* note 14.

¹⁷ For further commentary on the justifications for FGM see, Johnson M, “Making mandinga or making Muslims? Debating female circumcision, ethnicity, and Islam in Guinea-Bissau and Portugal”, in Hernlund Y, Shell Duncan B, eds, “Transcultural Bodies: Female Genital Cutting in Global Context”, Rutgers University Press: New Brunswick, (2007), at 202-223. See also, Talle, *supra* note 10, at 83-106. See also, Almroth L, Almroth-Berggren V, Hassanein OM, Al Said SS, Hasan SS & Lithell UB, “Male Complications of Female Genital Mutilation”, 53 *Social Science and Medicine* 1455, (2001), at 1455–1460; Johnson, *supra* note 17; Hernlund Y, “Winnowing Culture: Negotiating Female ‘Circumcision’ in the Gambia”, (2003), PhD thesis. University of Washington, Seattle; Ahmadu F, “Rites and wrongs: an insider/outsider reflects on power and excision”, in Shell-Duncan B, & Hernlund Y, eds. “Female ‘circumcision’ in Africa: culture, controversy and change”, Boulder, Colorado, Lynne Rienner, (2000), at 283-312.

¹⁸ WHO, “Female Genital Mutilation: Prevalence”, (2017), available online via the WHO website at <http://who.int/reproductivehealth/topics/fgm/prevalence/en/> (last accessed 10/7/17). See also, UNICEF, “Female Genital Mutilation/ Cutting: a Global Concern”, (2016). This document is available online at http://data.unicef.org/wp-content/uploads/2016/04/FGMC-2016-brochure_250.pdf (last accessed 10/7/17).

¹⁹ See, UNICEF, “Female Genital Mutilation/ Cutting: a Global Concern, *supra* note 18.

²⁰ *Ibid.* See also, HM Government, “Multi-agency Practice Guidelines: Female Genital Mutilation”, *supra* note 9, at 10.

From the outset it should be noted that the issue of gender persecution will not be examined in its totality as that is beyond the scope of the thesis. The focus is on one aspect, FGM, but where further consideration of the issue of gender persecution arises it will be given due consideration. Thus, whilst this thesis focuses on the practice of FGM, it recognises that there is a tendency to assume a gendered approach to refugee determination means exclusively addressing the experiences of women. As women and girls are disproportionately affected by gender inequality, on account of their unequal access to rights, resources, and political power, as well as other gendered power imbalances, a focus on women and girls is often necessary.²¹ However, the gendered experiences of men and the roles of masculinities are increasingly being recognized and understood.²² Importantly, this thesis advocates that a gendered approach focuses not on individual women and men but on the system which determines gender roles and responsibilities, access to and control over resources, and decision-making potentials. Thus, this thesis seeks to break down the social and cultural ideas surrounding gender, which have conditioned the structures of refugee law. It will examine how FGM as an example of gender violence is treated within the Refugee Determination Process.²³ In so doing it aims to identify areas which require reform, to ensure that victims of FGM and resultantly other claimants of gender-based violence have access to a fair and accommodating decision-making process, one well-removed from the current ‘lottery’ system.

The central argument therefore offered is that, if gender-based forms of violence were subject to the protective processes implemented within specialised domestic violence

²¹ For scholar articles on this subject see, Edwards A, “*It’s a Man’s World: The Effect of Traditional Masculinity on Gender Equality*”, (2015), available online at <http://www.e-ir.info/2015/03/29/its-a-mans-world-the-effect-of-traditional-masculinity-on-gender-equality/> (last accessed 1/6/17); Hughes M & Paxton P, “*Women, Politics, and Power: A Global Perspective*”, (2nd ed), London: SAGE Publications, Inc., (2014); Zimmerman D & West C, “*Doing Gender*”, in Aronson A and Kimmel M (eds.), “*The Gendered Society Reader*”, (5th ed), New York: Oxford University Press, (2014); International Labour Organization, “*Men and Masculinities -Promoting Gender Equality in the World of Work*”, (2013), available online at http://www.ilo.org/wcmsp5/groups/public/---dgreports/-gender/documents/publication/wcms_232755.pdf (last accessed 1/8/17); Carpenter C, “*Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situation*”, (2006), available online via the Security Dialogue website at <http://journals.sagepub.com/doi/pdf/10.1177/0967010606064139> (last accessed 2/6/17); Alden A, “*A Continuum of Violence: A Gendered Analysis of Post-Conflict Transformation*”, 3 Polis Journal 1, (2010).

²² *Ibid.*

²³ Hereafter referred to as the RDP.

courts, the RDP could be more inclusive and accommodating of the needs of claimants. This proposition firstly reinforces the argument that culturally recognized practices do not lose their criminal label just because some people demand that they be labelled as cultural practices. Secondly, it allows us to examine the protective functions of specialised domestic violence courts and programme for victims and how that shift in attitudes and practices might be replicated or mirrored in some shape or form within the RDP, in respects of FGM and other gender-based claims. Thus, this thesis posits that like the criminal response to domestic violence, existing refugee determination procedures and processes need to be reformed to adequately address the complexity of FGM and in tandem correct the legal, historical and moral disparities in the protection afforded to female refugee claimants. Drawing upon the experiences of three jurisdictions, Canada, the United Kingdom (UK) and the United States (US), this thesis develops and explores the framework underpinning the innovative specialised domestic violence courts and aims to examine how the shift in attitudes and practices towards domestic violence within the domestic criminal justice systems of these case-studies may be transposed within the RDP.

Context is also important. Criminal law and refugee law at first glance do not appear to have a great deal in common since they regulate different realms of interest.²⁴ Criminal law, both internationally and domestically is concerned with the punishment of perpetrators. Refugee law, on the other hand, is an aspect of human rights law which is designed to set out in which circumstances States will extend protection to those individuals in fear of persecution.²⁵ However, these two distinct areas of law intersect in a number of small and important ways.²⁶ Firstly, it can be argued that within the international context, they are inextricably linked, insofar as the same harms form many international crimes and fundamental human rights violations, i.e., torture, slavery, and

²⁴ Rikhof J, “*Complicity in International Criminal Law and Canadian Refugee Law*”, 4 *Journal of International Criminal Justice* 702, (2006), at 702.

²⁵ *Ibid.* See also, Judgment, *Kupreskić* (IT-95-16), Trial Chamber, 14 January 2000, at 586-598 which was of the view that the interpretation of persecution in refugee law or human rights law was of little assistance to provide parameters for the crime against humanity of persecution.

²⁶ Unfortunately, due to the vast arguments surrounding the linkages between refugee and criminal law, the researcher can only make a small reference to this issue here. However, for more coherent arguments and commentary please refer to the sources referred to below.

unlawful killings.²⁷ Secondly, they both make use of the exclusion clause contained in the 1951 Refugee Convention so as to ensure that serious criminals would not obtain the benefits of the Refugee Convention.²⁸ Both areas of law are relatively new. Following the development of the International Criminal Tribunals for the former Yugoslavia²⁹ and Rwanda,³⁰ and the International Criminal Court³¹ issues surrounding gendered aspects of persecution³² have become more firmly established and defined. Indeed, it has been suggested that the ICC would benefit from guidance outside of the sphere of criminal law in terms of defining and addressing the crime against humanity of gender-based violence. International refugee law since 1985 has acknowledged gender-based forms of violence. This recognition influenced the drafters of the Rome Statute to include gender within the list of persecutory grounds in the crimes against humanity provision.³³ The cooperative linkages between these two spheres of law are irrefutable. International and domestic refugee law has explored certain elements of gender-related persecution that until recently, were for the most part unexplored in international criminal law.³⁴ Thus, just as it has been suggested that judges of the ICC when determining the content of the elements

²⁷ De Than C & Shorts E, “*International Criminal Law and Human Rights*”, London: Sweet & Maxwell, (2009), at 346.

²⁸ See, the United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UN Doc. HCR/IP/4/Eng/REV.1 (1992)), at 148-150; See also Henkaerts J and Doswald-Becks L (eds), “*Customary International Humanitarian Law*”, Volume 1: Rules (Cambridge University Press: Cambridge, 2005), at 610-611. For further information on the use of the exclusion clause contained in the 1951 Refugee Convention 189 UNTS 137, see, Rikhof, *supra* note 24. Work by the UNHCR includes ‘*The Exclusion Clauses: Guidelines on their Application*’ (December 1996); ‘*Note on Exclusion Clauses*’ by the Executive Committee of the High Commissioner’s Programme (30 May 1997, Document EC/47/SC/CRP29); the Summary Conclusions of the Lisbon Expert Roundtable on Exclusion as part of the Global Consultations Rome Statute on International Protection (20 May 2001, Document EC/GC/012Track/1); the ‘Guidelines on International Protection: Application of the Exclusion Clauses: Article IF of the 1951 Convention relating to the Status of Refugees’ and its accompanying ‘Background Note to the Guidelines’ (4 September 2003, Document HCR/GIP/03/05); the ‘Resettlement Handbook’, 1 November 2004. Chapter 3.7; and ‘Procedural Standards for Refugee Status Determination under UNHCR’s Mandate’, 1 September 2005, chapter 4.8.

²⁹ Hereafter referred to as the ICTY.

³⁰ Hereafter referred to as the ICTR.

³¹ Hereafter referred to as the ICC.

³² See, Oosterveld V, “*Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution*”, 17, *Duke Journal of International and Comparative Law* 49, (2006).

³³ Oosterveld V, “*The Definition of ‘Gender’ in the Rome Statue of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*”, 18 *Harvard Human Rights Journal* 55, (2005), at 59.

³⁴ Oosterveld, “*Gender, Persecution, and the International Criminal Court*”, *supra* note 32, at 51.

of the crime against humanity of gender-based persecution should examine principles or rules found within refugee law,³⁵ it is arguable that such an approach has opened the door to allow an innovative concept to be examined, such as that proposed in this thesis. International refugee law has informed international criminal law, and a clear overlap can be found between the two. It is therefore also reasonable and logical to examine how at the domestic level, ‘gendered’ criminal processes and procedures can inform the RDP. In other words, this concept can shed light on the strengths and weaknesses of the RDP and the specialised domestic violence courts inform responses and allow for recommendations to be made at all levels. Thus, this is essentially one of the original contributions which this thesis will make to the existing literature in this area. Ultimately, without this examination and response, root causes underpinning the ‘refugee roulette’ in gender-based claims for refugee status will not be addressed and State remedies, such as the use of gender-guidelines will remain partially effective, at best. Ultimately, whilst this thesis postulates that this innovative concept presents challenges, it is nevertheless an appropriate concept. Firstly, it represents the changing nature and discourse of the law and about violence against women and, secondly the rights of women to be afforded equality of access and treated in a gender-sensitive manner within all legal/quasi-judicial processes.

The examination of whether the RDP would benefit from the protective processes implemented within the specialised domestic violence courts must necessarily involve a consideration of the wider discussions on the treatment of gender-based violence and the procedural and evidential barriers inhibiting women’s access to the RDP. In line with such gender scholarship, O’Rourke has argued that the important entry-point for gender analysis begins with the visible exclusion of *women* and experiences disproportionately associated with women.³⁶ This is particularly evident within the refugee context.

³⁵ When faced with a question that the Rome Statute, the ICC’s Rules of Procedure and Evidence, and the Elements of Crimes do not answer, the ICC shall first apply “applicable treaties and principles and rules of international law,” and failing that, “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.” See, Rome Statute of the International Criminal Court art. 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 999, 1004 (1998), art. 21(1)(b)-(c).

³⁶ O’Rourke C, “*Transitional Justice and Gender*”, in Lawther C, Moffett L & Jacobs D (eds), “*Research Handbook on Transitional Justice*”, Edward Elgar: Cheltenham, (2017), at 117-141.

Consequently, the following section aims to contextualize those barriers through an examination of the concept and treatment of gender within the sphere of international refugee law and its significance.

III. Normative Theoretical Framework

A. Gender Bias in International Refugee Law

In pursuit of its ideal that “human beings shall enjoy fundamental rights and freedoms without discrimination”,³⁷ international refugee law has developed to protect those individuals who are unjustly persecuted in their homelands. However, the current standards for granting refugee status are overly narrow and are consequently insufficient to protect those who live in fear of such persecution. The rights of women are often overlooked due to a definition of “refugee” that fails to enumerate gender as a persecution ground and encompass the type of persecution that women often suffer. The 1951 Refugee Convention, the document which established this definition, grants protection to those who suffer political persecution in the public sphere. If a woman can establish that she has a well-founded fear of being persecuted because of her race, religion, nationality, membership in a social group or political opinion as the Convention specifies, she will of course be granted protection. However, because women are often restricted by their societies to the private sphere and suffer persecution for different reasons than men, they are often found ineligible for the Convention's protection.³⁸

³⁷ 1951 Refugee Convention or the Refugee Convention, *supra* note 28.

³⁸ See Dorlinf K, *et al*, “*Refused: The Experience of Women Denied Asylum in the UK*”, (2012), available online at http://www.scottishrefugeecouncil.org.uk/news_and_events/blogs/1711_refused_the_experiences_of_women_denied_asylum_in_the_uk (last accessed 27/4/16). Some commentators contend that such a formulation of persecution denies women's experiences outside the private sphere and erects an impenetrable wall between the social and private realms. See, Greatbach J, “*The Gender Difference: Feminist Critiques of Refugee Discourse*”, 1 International Journal of Refugee Law 520, (1989). However, a conception of persecution which includes social persecution does not necessarily preclude women's claims based on political persecution. The other categories of the Refugee Convention would still apply to women who suffer persecution for those reasons. Expanding the definition merely extends protection to those women whose persecution is outside the scope of the convention.

Since women are often relegated and restricted to the domestic, private sphere and men largely operate within the public, political sphere of life, international law is unable to effectively evaluate the gender-related refugee claims of women. This restriction of women's ability to participate in the public sphere of life is most prevalent in traditional societies, but it also exists in more developed countries, including the case-studies. Arguably, whilst persecution because of gender is widely recognised by human rights advocates, the ability to seek refugee status from persecution on account of gender has failed to develop accordingly. While part of this lack of development reflects a more general failure within the human rights discourse to adequately reflect the persecution of women, it also in part results from archaic ideas of who a refugee is³⁹ and political motivations.

Undoubtedly the relationship between gender and violence is complex. Evidence suggests, however, that gender inequalities increase the risk of violence by men against women and inhibit the ability of those affected to seek protection.⁴⁰ As will be discussed in greater detail in Chapter One, a key factor inhibiting the protection of women under international human rights law is that existing laws identify sexual equality with equal treatment.⁴¹ Differences in gender roles and behaviours often create inequalities, whereby one gender becomes empowered to the disadvantage of the other.⁴² Thus, in many societies, women are viewed as subordinate and have a lower social status, allowing men control over, and greater decision-making power than, women. Such inequalities have a large and wide-ranging impact on society. For instance, they can contribute to gender inequities in health and access to health care, opportunities for employment and promotion, levels of income, political participation and representation and education. Often inequalities in gender increase the risk of acts of violence by men against women.

³⁹ Thiele B, "*Persecution on Account of Gender: A Need for Refugee Law Reform*", 11 Hastings's Women's Law Journal 221, (2000), at 222.

⁴⁰ World Health Organisation, "*Violence Prevention – The Evidence: Promoting Gender Equality to Prevent Violence Against Women*", (2009), at 1. This document is available online at http://www.who.int/violence_injury_prevention/violence/gender.pdf (last accessed 3/6/17).

⁴¹ For a comprehensive discussion on issues pertaining to equality within the context of international, national and domestic laws please see, McColgan A, "*About Discrimination, Equality and the Law*", Hart Publishing: London, (2016); Freedman S, "*Engendering socio-economic rights*", in Hellum A & Sinding Aasen H, "*Women's Human Rights*", Cambridge University Press: Cambridge, (2013) at 217-42.

⁴² See, World Health Organisation, "*Violence Prevention – The Evidence: Promoting Gender Equality to Prevent Violence Against Women*", *supra* note 40 at 3.

Thus, it is argued that the promotion of gender equality is a critical part not only of violence prevention⁴³ but also of ensuring that women are protected within the RDP.

The gender inequity of the current system is further demonstrated by its unjust and inconsistent results. Recent figures from the UNHCR reveal that women and young girls comprise about fifty percent of any refugee, internally displaced or stateless population.⁴⁴ Coupled with the fact that the United Nations⁴⁵ estimates allege that between seventy and eighty percent of the world's refugees are female,⁴⁶ most of those who are actually granted refugee status are male.⁴⁷ Such disparity is no longer an abstract problem which can be ignored, reform is needed. The RDP deals with vulnerable individuals and in the words of Mawson, we should remember that, first and foremost, this process is about people's lives.⁴⁸ Consequently, to sufficiently protect the rights of female refugees, this thesis will argue that the RDP needs to be reformed, to include the private persecution which women suffer on account of their gender. Such procedural reforms, which include a reshaping of the very structures and mechanisms currently in use within the case-studies, will ensure equitable treatment for female victims of gender-based violence within a gender-sensitive and accommodating process. In adding to the discourse in this area, this thesis argues that the process by which refugee determination is made is almost as important as the actual interpretation of the 1951 Refugee Convention definition. The Refugee Convention definition must be a living instrument, where the meaning is constant but the application may change over time.⁴⁹ This thesis will argue (to the extent permissible within the

⁴³ *Ibid.*

⁴⁴ UNHCR, "Women", (2017), available online via the UNHCR website at <http://www.unhcr.org/uk/women.html> (last accessed 9/4/17).

⁴⁵ Hereafter referred to as the UN.

⁴⁶ UN, "The World's Women 1970-1990: Trends and Statistics", (1991), at 74.

⁴⁷ Aeckert A, "Gender in International Refugee Law", (2008), available online via the Race and Ethnicity website at <http://race.eserver.org/refugee-law.html> (last accessed 4/4/17). *See also*, UNHCR, "Women", *supra* note 44.

⁴⁸ Mawson A, "Women Fast-Track to Asylum Denial", (2010), available online at <http://www.guardian.co.uk/commentisfree/2010/feb/26/asylum-fast-tracked-women-refugees> (last accessed 10/2/17).

⁴⁹ *See*, Sigmarsdottir D, "Refugee Status and Gender-Related Persecution", B.A Thesis, University of Akureyri: Faculty of Law and Social Sciences, (2008), at 13. This thesis is available online at https://skemman.is/bitstream/1946/1618/1/Refugee_Status_&Gender-Related_Persecution.pdf (last accessed 10/3/17); *Sepet and Bulbul v. Secretary of State for the Home Department*, (2003) UKHL 15, at section 11 per Lord Bingham. The reasoning of Bingham was adopted from Sedley J in *R v. Immigration Appeal Tribunal, ex parte Shah*, (1997) Imm AR 145, at 152. Bingham also approved of the observation of Laws LJ in *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, (1999) 3 WLR 1274, that "it is clear that the signatory states intended that the Convention should affront continuing

constraints of the thesis) that content and meaning must be widely known and owned by the ‘public’⁵⁰ if it is to have an impact on those who need it most and is to be regarded as a legitimate, accommodating and gender-inclusive text. Furthermore, it will be argued that a reformed RDP based on the inclusivity of ‘gender’, creating a space for the ‘public’ to have a say, can also help influence the interpretation of the wording of the Refugee Convention definition. Although a full discussion of the legal, political, psychological and cultural aspects of the RDP are beyond this thesis and deserve ongoing research; this thesis hopes to develop a constructive narrative which challenges the current refugee evaluative system, while also highlighting the difficulties that FGM victims face within the RDP.

The primary area of concern for female refugees is protection. Protection falls into three broad categories. The first, which my thesis focuses on, is at the level of refugee status determination and the insufficiency afforded to women by the current refugee definition under international law. The second issue is that of physical insecurity surrounding women refugees not enjoying permanent settlement and the third is at the level of programming, where the basic insensitivity of officials during operations inhibits fair distribution of food distribution, access to healthcare, education, and employment.⁵¹ Of the three, the easiest to rectify, appears to be the third and some aspects of the second category of protection, which is the main thrust of UNHCR Guidelines. The issues of legal protection and durable physical protection, which directly ties in with the former, are not easily resolved or tackled. These are deeply rooted in legal discourse; functioning and response capacity of the state/administrative machinery; and actions of private actors that are either dismissed or implicitly accepted by various states. Despite the recognition and attempts made by UNHCR in this regard, there continues to be a neglect of any such formalized approach and acceptance of existing discriminatory policies by the

protection for refugees in the changing circumstances of the present and future world. In our view, the Convention has to be regarded as a living instrument.”

⁵⁰ In using the term ‘public’, this thesis is referring to all those individuals who play a part in or who will utilise the RDP as a means of obtaining protection.

⁵¹ Kelley H, “*Report on the International Consultation on Refugee Women*” Geneva, 15-19 November 1988, with particular reference to protection problems”, *International Journal of Refugee Law*, vol.1 (1989), at 237.

international community of states in dealing with women refugees. The following section examines how this neglect continues.

B. Gender Issues in the Development of International Refugee Law

The international community's obligation to asylum seekers is based on the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement*. The Refugee Convention defines a refugee as a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside (her) country of origin and is unable or, owing to such fear, is unwilling to avail (herself) of the protection of that country; or who, not having a nationality and being outside the country of (her) former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁵²

Although persecution is not defined by the Refugee Convention, the grounds of such persecution are listed as race, religion, nationality, membership of a particular social group or political opinion. This definition of what constitutes a 'refugee' has been highly debated given its perception of being a cold war instrument, narrowly defined to contain future refugee flows and its failure to address and recognise present day refugee movements that may be a result of economic disasters, war, and persecution on account of gender.⁵³ The 1951 Convention in its narrowly defined approach, covers civil and political rights, and ignores economic, social and cultural rights, which are largely the root causes of women seeking protection. Women may be the victims of rape, torture, and sexual abuse committed by private and public actors alike that may have social sanction in certain situations (FGM being an example of social acceptance in many countries), who may also be subjected to such torture by state agencies on account of their gender.⁵⁴

⁵² See, 1951 Refugee Convention, *supra* note 28.

⁵³ See, Crawley, *supra* note 13, at 4 citing, Goodwin-Gill G, "*The Refugee in International Law*", Clarendon Press: Oxford, (1983); Hathaway J, "*The Law of Refugee Status*", Butterworths: Toronto, (1991) & Macdonald A & Blake NJ, "*Macdonald's Immigration Law and Practise in the United Kingdom*", (4th Ed), Butterworths: London, (1995).

⁵⁴ Raj S, "*The Gender Element in International Refugee Law: Its Impact on Agency Programming and the North South Debate*", 1 Yearbook of International Humanitarian and Refugee Law 164, (2001), at 166-67.

Furthermore, women may flee a country when they are kept from engaging in basic life-sustaining economic activities primarily on account of their gender and not only on account of the recognized grounds of persecution. Consequently, the non-recognition of gender as grounds for persecution then specifically leads to an interpretive problem, coupled with procedural barriers which results in the denial of refugee status or asylum to those genuinely deserving such status. Clearly then a deficiency exists within the existing international legal framework concerning the status of refugees, since it fails to address these issues.

Thus, as the following section will discuss, it is paradoxical that at one level, under a general human rights framework international law is expansionary and women's rights are increasingly being addressed. Yet at another, under a male orientated refugee-specific framework, women's claims are often formulated in ways which reflect the decision-makers understanding of the law rather than the reality of the applicant's experiences.

C. The Concepts of 'Gender' and 'Gender-Related Persecution'

Violence against women is a technical term used to collectively refer to violent acts that are primarily or exclusively committed against women. Similar to a hate crime, this type of violence targets a specific group with the victim's gender as a primary motive. The United Nations General Assembly defines 'violence against women as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁵⁵

As such, gender-based violence both reflects and reinforces inequities between men and women and compromises the health, dignity, security and autonomy of its victims. It encompasses a wide range of human rights violations, including sexual abuse of children, rape, domestic violence, sexual assault and harassment, trafficking of women and girls

⁵⁵ See U.N. Fourth World Conference on Women, Report of the Fourth World Conference on Women, U.N. Fourth World Conference on Women, Para. 112, U.N. Doc. A/CONF.177/20, U.N. Sales No._ (1995), para 113.

and several harmful traditional practices, including FGM.⁵⁶ FGM, as discussed above, is inherently gendered and an extreme example of the general subjugation of women. Its contrast with male circumcision is obvious: where performed for ritualistic rather than health reasons, male circumcision may be seen as symbolising the dominance of the male. Thus, whilst FGM may ensure a young woman's acceptance within the family and society, she is only accepted on the basis of institutionalised inferiority.⁵⁷ In examining this controversial practice, this thesis contributes to the literature on FGM, particularly in respect of its categorisation as a gender-based form of violence against women. Firstly, it reinforces the fact that it is a form of violence committed against women which can be utilised as a basis for claiming refugee status. Secondly, by examining comparatively how such complex forms of violence are accommodated for within the RDP's of my case-studies. Thirdly it contributes to the existing literature by comparatively examining how decision-makers specifically apply and interpret the Refugee Convention definition and gender-guidelines when addressing FGM as a basis for refugee status.

Whilst, the existing literature and commentaries on the experiences of refugee women has been important in highlighting the marginalization of women within current interpretations of international refugee law, it is also problematic. This quandary stems from its tendency to be grounded in an analysis of 'sex' as the key factor accounting for the differential experiences of refugee women rather than the construction of gender identity in particular historical, geographical, political and socio-cultural contexts.⁵⁸ 'Gender' refers to the "relationship between women and men based on socially or culturally construed and defined identities, status, roles and responsibilities that are assigned to one sex or another", whereas 'sex' is a biological determination.⁵⁹ Thus,

⁵⁶ UNFPA, "Gender Equality", (2016), available online via the UNFPA website at <http://www.unfpa.org/gender/violence.htm> (last accessed 1/5/16). Whilst FGM and domestic violence both fall under this category, it is important to note from the outset that whilst their distinctive similarity is that both these practices reinforce the subordinate position of women, they are also inherently different. Notably, as will be discussed more fully in Chapter Three, domestic violence is predominately carried out by men against women, whereas women, in order to ensure their survival within patriarchal societies carry out FGM on other women.

⁵⁷ *K & Fornah* (2006) UKHL 46 (reasoning of Lord Bingham).

⁵⁸ *Crawley*, *supra* note 13, at 6.

⁵⁹ *See*, Guidelines on international protection: Gender-related persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HRC/GIP/02/01, 7 May 2002 (hereafter UNHCR Gender Guidelines), Para 3.

gender is not static or innate but acquires culturally and socially constructed meaning because it is a primary way of signifying relations of power.⁶⁰ This thesis posits that any analysis or process which provides for the analysis of the way in which gender shapes the experiences of female claimants, must therefore contextualise those experiences.⁶¹ Although not exclusive to women and girls, gender-based violence principally affects them across all cultures.⁶² Thus, it has to be recognised that the forms of violence suffered by women may be gender specific. The reasons why they are tortured may relate to gender specific inequalities or roles, and women and girls' access to a remedy and reparation for the harm they suffered may hold challenges. Thus, understanding the ways in which women are violated as women is vital to naming as persecution those forms of harm which only/mostly affect women⁶³ and establishing a process which accommodates and contributes to this understanding.

According to Crawley, gender-specific persecution is therefore a term used to explain 'serious harm' within the meaning of persecution. Gender-related persecution is used to explain the basis of the refugee claim.⁶⁴ A woman may be persecuted as a woman (i.e. raped) for non-gender reasons (i.e. because of her political opinion or nationality), not persecuted as a woman but still because of gender (i.e. because of her failure to comply with societal norms, like covering her face), and persecuted as and because she is a woman (i.e. FGM).⁶⁵ Gender-specific violations do not necessarily constitute persecution because of gender and this thesis acknowledges this fact. For example, if a man's genitals are subjected to electric shocks, he is certainly being tortured in a gender-specific manner, but it does not follow that he is being persecuted because of his gender.

⁶⁰ Crawley, *supra* note 13, at 7.

⁶¹ See, Benjamin A & Murchison L, "Gender-Based Violence: Care and Protection of Children in Emergencies", (2004), at 3-4, available online via the GSDRC Applied Knowledge Services at <http://www.gsdr.org/document-library/gender-based-violence-care-protection-of-children-in-emergencies/> (last accessed 10/3/17).

⁶² *Ibid*, at 4. See also generally, Ward J, "If Not Now, When? Addressing Gender-Based Violence in Refugee, Internally Displaced, and Post-Conflict Settings", (2002), New York: The Reproductive Health for Refugees Consortium.

⁶³ Crawley, *supra* note 13, at 7.

⁶⁴ *Ibid*, at 7-8.

⁶⁵ *Ibid*, at 8. See also, REDRESS, "Sexual and Other Forms of Gender-Based Violence", (2016), available online at <http://www.redress.org/post-conflict-justice/sexual-and-other-forms-of-gender-based-violence> (last accessed 15/12/16).

Whilst the primary objective of this thesis is to redress the inconsistent and arguably inadequate treatment of FGM within the RDP, this thesis also examines the ways in which gender shapes women's experiences as 'women' which negate critical aspects of oppression and resistance. Thus, the thesis postulates that the current framework and procedures for refugee determination need to be reformed to accommodate "an inclusion of women not as a special case deviating from the norm, but as one of many different groups in an open and heterogeneous universe".⁶⁶ The theoretical focus will therefore examine the ways in which socially and culturally construed ideas on 'gender' have inured the normative frameworks and processes of international refugee law.⁶⁷ This approach to the politics of protection used by other academics, suggests that the problem is not so much the invisibility of women but rather how their experiences have been 'represented and analytically characterised'⁶⁸ within the RDP. The use and development of this approach is imperative to ensure that FGM related refugee claims are consistently and properly considered by decision-makers. According to Heaven Crawley, who has also used this approach within her research, "looking at gender as opposed to sex, enables an approach which can accommodate specificity, diversity and heterogeneity".⁶⁹ More importantly, it also ensures that such claims are not dismissed as culturally relative and outside the scope of protection offered under the 1951 Refugee Convention.⁷⁰

D. Cultural Relativism

Another theme/issue which emerges throughout the academic commentary and the case-law analysis relating to FGM and warrants consideration, concerns the relationship between women's human rights and the issue of cultural relativism.

The debate concerning cultural relativism and women's human rights has resulted in the adoption of two directly opposite opinions. On the one hand, there are those who argue that women's human rights are continually violated by oppressive patriarchal societies,

⁶⁶ Crawley, *supra* note 13, at 9.

⁶⁷ *Ibid.*

⁶⁸ Indra DM, "Ethnic Human Rights and Gender Differences: Gender Implications for Refugee Studies and Practice", 2 *Journal of Refugee Studies* 221, (1989), at 221-42.

⁶⁹ Crawley, *supra* note 13, at 9.

⁷⁰ *Ibid.*

which espouse restrictive traditions and cultures.⁷¹ On the other hand, there exist those who campaign for the maintenance of practices such as FGM on grounds of cultural relativism and the right for centuries-old customs and traditions to exist.⁷² Many countries have in recent times, acknowledged the human rights stance over and above cultural maintenance arguments and have ratified international conventions, declarations⁷³ and regional instruments, which make provision for the promotion and protection of the rights and health of women and young girls. In fact, many countries have even outlawed the practice of FGM.⁷⁴

Perhaps one of the most controversial issues pertaining to cultural relativism concerns approaches which argue that human rights are not universal but should instead be viewed in relation to the cultures to which they apply.⁷⁵ According to Niamh Reilly, debates about

⁷¹ Afkhami M, “Women, Gender, and Human Rights: A Global Perspective” in Agosin S, (ed), “*Gender Apartheid, Cultural Relativism, and Women’s Human Rights in Muslim Societies*”, New Jersey: Rutgers University Press, (2001), at 234-245. See also, United Nations Human Rights Office of the High Commissioner, “*Women’s Rights are Human Rights*”, New York and Geneva, (2014), at 27-29. The PDF of this document is also available online at <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> (last accessed 15/5/17). For further discussions on the complexity of the arguments surrounding human rights and cultural relativism see generally, Downes C, “*Women’s Rights in a Muslim Context: From Theory to Advocacy*”, 1 Brussels Journal of International Studies 17, (2004).

⁷² Ibid. See also, Buncombe A, “*New Jersey Governor Refuses to Ban Child Marriage because it would Conflict With Religious Customs*”, (15/5/17), available online via the INDEPENDENT website at <http://www.independent.co.uk/news/world/americas/new-jersey-chris-christie-child-marriage-ban-fails-religious-custom-a7735616.html?cmpid=facebook-post> (last accessed 16/5/17). See also, Desai S, “*Hearing Afghan Women’s Voices: Feminist Theory’s Reconceptualization of Women’s Human Rights*”, 16 Arizona, Journal of International and Comparative Law 805, (1999). See also, Uyo D, “*Why Communities Continue Female Circumcision despite the 2015 Ban*”, (2017), available online at <https://www.pressreader.com/nigeria/daily-trust/20170314/281865823277408> (last accessed 13/5/17). See also more generally, Mutua M, “*Politics and Human Rights: An Essential Symbiosis*”, in Byers M (ed.), “*The Role of Law in International Politics – Essays in International Relations and International Law*”, Oxford: OUP, (2000) and Tibi B, “*Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations*”, 16 Human Rights Quarterly 277, (1994), at 290 (arguing that the human rights stance has little resonance in societies where duties to family and society predominate).

⁷³ See, “*Women’s Rights are Human Rights*”, *supra* note 71. For a more detailed list of International and Regional Instruments which can be referenced for the elimination of FGM, please see, UNFPA, “*Female Genital Mutilation Frequently Asked Questions*”, (2016), available online via the United Nations Population Fund website at http://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#banned_by_law (last accessed 28/12/16).

⁷⁴ For a complete list of countries which have outlawed the practice of FGM please refer to, UNFPA, “*Female Genital Mutilation Frequently Asked Questions*”, (2016), *supra* note 73.

⁷⁵ Downes, *supra* note 71 at 20 stating that, “cultural relativists argue that all rights are contingent on the understanding of the culture in which those rights are expressed. They fundamentally reject the implicit moral superiority associated with universal rights doctrine and point to real diversity in cultural practices even within relatively culturally homogenous regions”. See also, Renteln A.D., “*International Human Rights: Universalism Versus Relativism*”, Sage: Newbury Park, (1990), at 72 and Cerna C.M., “*Universality*

the meaning of the universality of human rights and whether human rights simply express Western hegemony and, therefore, are fundamentally at odds with respect for cultural diversity and integrity are a major feature of contemporary human rights discourse.⁷⁶ In light of these arguments, this thesis posits that the association between human rights and culture is specific to women, and has been used by decision-makers (in some instances to mask their gender and racial biases) to argue against granting refugee status to FGM claimants. Thus, decision-makers should not be able to consider or use this association of culture and human rights when determining a women's gender-based refugee claim. FGM is an internationally recognised human rights violation⁷⁷ and like the recognition of domestic violence at the domestic level as a criminal and human rights matter, this thesis advocates for the same recognition of FGM, not as a cultural practice but as a human rights violation. Such an approach would effectively eliminate refugee denials on the basis that FGM is a cultural and personal ritual, whilst politicizing the experiences of such claimants and including them within a human right's, rather than a masculine interpretation of international refugee law. To deny refugee status based on cultural relativism is a denial of human rights. Whilst, human rights arguments are intended to "‘trump’ sovereign States’ justifications for oppressive or restrictive behaviour and the international refugee system is supposed to be a mechanism for translating this theory into practice"⁷⁸ this is not always reflected in reality. Within the RDP, where foreign policy considerations, state priorities and restrictionist immigration pressures have a clear bearing on the decision-making process, "the content of protected rights has often been relativised in line with practices prevailing in different States".⁷⁹ This process is reflected

of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts", 16 *Human Rights Quarterly*, Vol. 16 (1994), 740, at 750.

⁷⁶ See, Reilly N, "Women's Human Rights – Seeking Gender Justice in a Globalizing Age", Cambridge: Polity Press, (2009), Chapter One.

⁷⁷ Strong support for the protection of the rights of women and girls to abandon FGM is found in international and regional human rights treaties and consensus documents. See, World Health Organisation, "Eliminating Female Genital Mutilation – An Interagency Statement", WHO: Geneva, (2008), at 8-11. This document is also available online at

http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf (last accessed 17/11/16).

⁷⁸ Crawley, *supra* note 13, at 11.

⁷⁹ *Ibid.*

in the use of ‘culture’ to exclude women from protection under the 1951 Refugee Convention.⁸⁰

The concept of culture⁸¹ is a dynamic notion, not a static one, and may be appropriated by decision-makers to justify an otherwise untenable decision or position. This thesis attempts to bridge the two diverging views; the view that human rights are universal, and the view that human rights are either non-existent or can vary among different cultures. Logic dictates that societies, cultures and customs are not static; they all evolve as time progresses. Similarly, respect for international human rights law does not require that every culture use a similar or even identical approach, what it does require, however, is that human rights be defined and protected in a manner consistent with international principles.⁸² Thus, regardless of the conflicting ideologies and cultural values to which nations adhere, the U.N. promulgated norms represent agreements by these participating nations to work toward a common goal.⁸³

Violence against women in all its forms is no longer a private issue; it has been recognized as a human rights violation.⁸⁴ Yet recognition and the legal measures discussed in the next section are not enough. Contributing to the literature in this area, violence prevention is a priority at the domestic level and effective mechanisms and processes for violence prevention and gender mainstreaming have been put into effect, an inspirational

⁸⁰ *Ibid.* In fact, Bhabha has stated that, “*Decisions upholding an asylum applicant’s claim of persecution may contain culturally arrogant, even racist descriptions of the state of origin’s policies. Conversely judgments that dismiss the asylum application may adopt the language of cultural sensitivity or respect for state sovereignty as a device for limiting refugee admission numbers*”. See, Bhabha J, “*Embodied Rights: gender persecution, state sovereignty and refugees*” 9 Public Culture 3, (1996), at 11. See also, *Islam v SSHD; R v IAT ex parte Shah* (1999) INLR 144, Imm AR 283 (HL) (Hereafter referred to as *Shah and Islam*).

⁸¹ For the purposes of this thesis, the term ‘culture’ refers to the customs, ideas and behaviours of a particular society or people.

⁸² Crawley, *supra* note 13, at 12.

⁸³ In fact, it has been said that, “*To argue that human rights are universal is not equivalent to saying that their understanding or interpretation is self-evident or immutable, or to deny the various cultural contexts in which human rights must be embedded. Rejecting radical cultural relativism does not preclude flexibility in the conceptualization, interpretation and application of human rights within and between different cultures. Human rights are universal but not absolute (in the sense of pure, unalloyed, completely uniform) in their application to various cultures. In this way, the relativist ‘truth’ about enculturation can be accommodated within a human rights framework*”. See, James SA, “*Reconciling international human rights and cultural relativism: the case of female circumcision*” 8 Bioethics 1, (1994), at 4.

⁸⁴ See, Ohana Y, et al, “*Gender Matters: Manual on Gender Based Violence Affecting Young People*”, Council of Europe: Budapest, (2007), at 60. This manual is available online at http://www.eycb.coe.int/gendermatters/pdf/Gender_matters_EN.pdf (last accessed 30/7/17).

example being the specialised domestic violence courts. This thesis advocates that similar procedural reforms would remedy the gender-bias inherent within refugee law, and the plethora of other problems, including the use of cultural relativism to deny protection to victims of FGM.

E. National and International Initiatives

A new awareness and willingness to take gender into account in policy development and implementation has emerged and there have been many encouraging recent developments legitimizing the factual basis for women's refugee claims. Concurring, Niamh Reilly has argued that traditionally accepted human rights abuses are specifically affected by gender, and violations against women have remained invisible within prevailing approaches to human rights.⁸⁵ For example, she has stated that, violations of women's human rights committed in the "private sphere" of the home, or in the context of familial or intimate relationships, have not been considered within the purview of a government's human rights obligations.⁸⁶ She posits that a renewed recognition of the moral authority that human rights afford, and of the potential of human rights practice to transform conditions of oppression have prompted women to ask why, to date, human rights thinking and policy have failed women.⁸⁷ Consequently, in light of this renewed recognition, individuals, advocates and human rights groups have focused their attention on highlighting awareness of gender-based violence and gender-specific forms of violence. International bodies, including the UNHCR and other U.N. bodies have attempted to address the intersection of gender-based violence and forced displacement. The Executive Committee of the UNHCR first issued formal recommendations regarding expansion of the Refugee Convention definition to include individuals who had experienced sexual violence or

⁸⁵ Bunch C & Reilly N, "*Demanding Accountability – The Global Campaign and Vienna Tribunal for Women's Human Rights*", (1999), available online at <http://www.cwgl.rutgers.edu/docman/coalition-building-publications/283-demand-accountability/file> (last accessed 9/6/17), at 3.

⁸⁶ *Ibid.*

⁸⁷ See, Reilly N, "*State Accountability for Women's Human Rights in Ireland*", Women's Education Research and Resource Centre, University College Dublin: Dublin, (1997).

other gender-related forms of persecution in 1991.⁸⁸ The Committee issued more comprehensive guidelines in 2002,⁸⁹ and has also exhorted states to develop and implement domestic criteria and guidelines regarding protection for women who claim refugee status based on a well-founded fear of gender-related persecution.⁹⁰ Several receiving states, including the case studies under examination in this thesis, have subsequently either enacted such guidelines or have amended refugee and asylum legislation to instruct adjudicators to recognize gender-based persecution as a potential ground for refugee protection. Focusing specifically on the approaches and recommendations made in the existing gender-guidelines, this thesis will examine how successful these approaches have been in assisting FGM refugee claims and in addressing the gender-bias of international refugee law. It is submitted that decision-makers and other interested parties within the RDP need to keep pace with, and consistently utilise, these developments.

Whilst important for raising awareness of relevant gender issues, particularly in respect of interpreting the Refugee Convention definition, this thesis further posits that steps taken to remedy the gendered or more accurately the un-gendered state of refugee law, particularly at an international level, have been somewhat redundant given that UNHCR policies and guidelines are not binding on domestic states.⁹¹ Therefore, and in light of the determination of States to address and prohibit violence against women, particularly at the domestic level, it is more pertinent to analyse successful procedural reforms at a domestic level, something which the UNHCR and domestic gender-guidelines fail to

⁸⁸ See, Office of the United Nations High Commissioner for Refugees, “*Guidelines on the Protection of Refugee Women*”, U.N. Doc. ES/SCP/67 (1991). (Hereafter referred to as *Guidelines on the Protection of Refugee Women*). These guidelines are available online via the UNHCR: The UN Refugee Agency website at <http://www.unhcr.org/3d4f915e4.html> (last accessed 10/2/17).

⁸⁹ See, UNHCR Gender Guidelines, *supra* note 59.

⁹⁰ UNHCR Exec. Comm., Conclusion No. 73 Refugee Protection and Sexual Violence, para e., (1993), reprinted in UNHCR, *A Thematic Compilation of Executive Committee Conclusions on International Protection* (4th ed. 200), at 240-42 (recommending that States develop “appropriate guidelines on women asylum-seekers, in recognition of the fact that women often experience persecution differently from refugee men”); UNHCR Exec. Comm., Conclusion No. 77 (1995), reprinted in UNHCR, *A Thematic Compilation of Executive Committee Conclusions on International Protection* 432 (4th ed. 2009), at 432. The *Compilation of Executive Committee Conclusions on International Protection* is available online via the UNHCR website at <http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf> (last accessed 27/3/10).

⁹¹ States accede to Conventions without any intention of complying, and the lack of enforcement procedures allow for this to take place. Thus, the treaty’s meaning may be reduced to mere theoretical guarantees. Hence, at present, it seems that international law affords women no adequate basis or protection of their fundamental human rights).

achieve. In contributing to the discourse, this thesis argues that any effort made to remedy the gendered state of the law in the country where the individual is seeking refugee status will be more instructive and instrumental in effecting the likelihood of the claim's success.

F. Zero-Tolerance toward Domestic Violence

Whilst, the determination of gender-based claims for refugee status within the RDP is problematic, at the domestic level, violence against women, committed in the private sphere is not tolerated. Society now widely accepts the elimination of violence against women, particularly domestic violence as a crucial goal, and it has been illegal in most countries since the late nineteenth century.⁹² Acknowledging the 'unresponsiveness', 'reluctance' and 'orientation towards non-enforcement' of laws and procedures towards female victims of domestic violence, by the police, prosecutors, judges and other court and service personnel,⁹³ the court system in many States, including the three case-studies, have begun to remedy the gender and cultural bias inherent in such cases by re-examining their traditional approaches to domestic violence. This traditional approach, which involved little or no special attention or resources dedicated to domestic violence cases, has been challenged by the emergence of enhanced specialised domestic violence courts.

The term 'specialised domestic violence courts' can encompass many different types of courts, from merely designating a few hours a week for protective order cases, to a court, which is dedicated to handling only domestic violence cases.⁹⁴ These courts are unique in that they bring together police, prosecutors, magistrates, probation service and specialist support agencies to help ensure more domestic violence offenders are prosecuted, and more importantly that victims have access to an inclusive and

⁹² Pleck E, "Wife Beating in Nineteenth-Century America", 4 VICTIMOLOGY: AN INT'L J. 60, (1979), at 60-63. See also, Epstein D, "Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System", 11 Yale Journal of Law and Feminism 3, (1999), at 3.

⁹³ Epstein, *supra* note 91, at 4; Tsai B, "The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation", 68 Fordham Law Review 1285, (2000), at 1286 (noting the frustration and embarrassment of those who work within the criminal justice system at their inability to protect victims of domestic violence, even after the arrest and prosecution of perpetrators and despite the issuance of protection orders).

⁹⁴ Lemon N, "Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?", 21 Berkeley Journal of Gender, Law and Justice 38, (2006), at 50.

accommodating process, which caters for their individual and specific needs. Thus, these courts which consolidate judges, legal representatives, court personnel, experts and other domestic violence resources into one system designed primarily to provide a much more effective response to domestic violence cases⁹⁵ convey the idea that the justice system recognises the distinct nature of domestic violence cases and the need for special attention to them. This thesis argues that by examining these courts and their processes, and subsequently replicating the ethos and to some degree the relevant structures and procedures of the specialised domestic violence courts within the RDP, refugee determination can similarly become gendered and specialised, and ultimately more accommodating for victims of gender-based violence. A reformed RDP, specialising in gender-based violence could arguably reduce the inconsistency evident in FGM determinations and help to eliminate the occurrence of potentially wrongful denials on the basis of credibility, cultural relativism and misapplication of the Refugee Convention definition and existing gender-guidelines. This unique analysis provides for the opportunity to contribute to the existing literature on these pioneering courts, specifically in respects of ascertaining their strengths and transposing them into other judicial forums including the RPD.

It is important to note that this thesis does not argue that every woman who claims refugee status based on FGM, is entitled to, or should, be granted such protection. Some claimants, it must be recognised fabricate their claims and in some instances, it has been revealed that following the granting of refugee status on the purported ground of opposition to FGM, a parent has nevertheless gone ahead and subjected their daughter to the practice.⁹⁶ It follows that, in cases where claims are lodged on this ground, it is necessary to assess the credibility of the claim very carefully, so as to avoid refugee status being granted on incorrect grounds. To reform the RDP to make it more accommodating for women, decision-makers and other interested parties must first have some means of benchmarking and determining fairness and success in service provision. It is argued that adherence to the inspiration of the specialised domestic violence courts and the processes

⁹⁵ Tsai, *supra* note 93, at 1287.

⁹⁶ UNHCR, “*Note 216: Guidance Note on Refugee Claims Relating to Female Genital Mutilation*” (May 2009), at 15. This note is available online via the UNHCR Refworld website at <http://www.unhcr.org/refworld/alerts.html> (last accessed 10/11/16).

which they have implemented to convey the message that the criminal justice system recognises the distinct nature of domestic violence and the need for special attention to victims provides the best innovation for making, challenging and indeed reforming, the existing gender imbalance in the way the RDP works and the manner in which some decision-makers address FGM – interpretation of the Refugee Convention through a male perspective.

IV. Choice of Case Studies

In terms of advancing the overall thesis and contributing to the discourse discussed above, the specific jurisdictions of Canada, the US, and the UK have been chosen for several reasons. All three jurisdictions are significant in that they have each recognised FGM as a valid basis for obtaining refugee status. In *Farah v. Canada*,⁹⁷ the IRB described FGM as a “torturous custom” and recognized it as a form of persecution. The US BIA determined in *In Re Fauziya Kasinga*,⁹⁸ that the level of harm in FGM constituted persecution. In the UK, refugee status in relation to a well-founded fear of FGM was first upheld in *Yake*⁹⁹ and in the leading case of *Fornah*¹⁰⁰, the former House of Lords¹⁰¹ noted that, “it is common ground in this appeal that FGM constitutes treatment which would amount to persecution within the meaning of the Convention”. The UKHL also found that “it is a human rights issue, not only because of the unequal treatment of men and women,

⁹⁷ *Farah v Canada* (MEI) (1994). The Board also found FGM to constitute a gross infringement of the applicant’s personal security, referring to the Universal Declaration on Human Rights (Hereafter referred to as the UDHR), Article 3, as well as a number of child-specific rights. See also *Annan v. Canada*, Minister of Citizenship and Immigration, the Trial Division of the Federal Court, 6 July 1995, available online via the Refworld website at

<http://www.unhcr.org/refworld/docid/49997ae2f.html> (last accessed 3/3/17). The Court referred to FGM as a “cruel and barbaric” practice and the applicant was granted refugee status. The position in Canada has been reinforced by many further decisions.

⁹⁸ *In Re Kasinga*, Int Dec 3278 (BIA 1996). *Kasinga* has been quoted in a series of further cases in the US, including in *Abankwah v. Immigration and Naturalization Service*, US Court of Appeals for the Second Circuit, 9 July 1999. The Court affirmed that it cannot be disputed that FGM involves the infliction of “grave harm constituting persecution”.

⁹⁹ Immigration and Appeals Tribunal, Appeal Number 00TH00493, 19 January 2000.

¹⁰⁰ *Fornah (FC) (Appellant) v. SSHD (Respondent)*, UK House of Lords, (UKHL 46), 18 October 2006.

¹⁰¹ The House of Lords has now been replaced by the Supreme Court. Hereafter referred to as UKHL.

but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment”.¹⁰²

A second common denominator shared by the three chosen jurisdictions is that despite their recognition of FGM as a valid basis for obtaining refugee status only a very small number of women have been subsequently granted refugee status on the grounds of FGM. Furthermore, irrespective of their essential similarities, like cases have resulted in disparate outcomes for claimants, thus reinforcing the idea of an asylum lottery.¹⁰³

Thirdly, each of the case studies have implemented gender-guidelines regarding protection for women who claim refugee status based on a well-founded fear of gender-related persecution. These implemented guidelines provide guidance to decision-makers on how to interpret the 1951 Refugee Convention definition and adjudicate asylum claims in a gender-sensitive manner.¹⁰⁴ As such, the gender-guidelines to be examined, all advise decision-makers to be sensitive to the wide spectrum of cultural, religious and other personal reasons why female claimants might experience humiliation, pain, trauma, or shame in recounting certain incidents, particularly those of a sexual nature.¹⁰⁵ The American, Canadian and British guidelines can be usefully compared with one another, to highlight just how important procedural practice is deemed to be within the respective guidelines in fostering an accommodating and inclusive RDP for claimants of gender-based violence. Arguably, by comparatively examining these guidelines and their guidance on procedural practice it is possible to learn from each of these guidelines and use them as building blocks and signs of good practices when proposing reforms.

Finally, a zero-tolerance stance towards domestic violence is a shared characteristic of the case-studies domestic criminal justice systems. Since the emergence of the battered women’s movement in the 1970s, activists have continued to achieve success in obtaining

¹⁰² See, Fornah, *supra* note 57, para 94.

¹⁰³ According to some academics, the vast majority of FGM claimants are “deported to be mutilated”. See, Comment, “*Deported to be Mutilated?*” (2005), available online via Anarkismo.net at http://www.anarkismo.net/newswire.php?story_id=840 (last accessed 14/2/17).

¹⁰⁴ Macklin A, “*Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims*” 13 *Georgetown Immigration Law Journal* 25, (1999), at 26.

¹⁰⁵ *Ibid*, at 35. See also, Luopajarvi K, “*Gender-Related Persecution as Basis for Refugee Status: Comparative Perspectives*” Abo Akademi University, Finland, Institute of Human Rights Research Report No 19, (2003), at 38. This report was previously available online at http://www.abo.fi/instut/imr/norfa/Katja_Genderrelated_persecution.pdf (last accessed 13/2/07).

legislation and funding for the protection of abused women and their children, along with educating the public about the horrors and devastating effects of domestic violence.¹⁰⁶ More importantly, over the years the concepts and manifestations associated with domestic violence have expanded. Definitions of domestic violence have been influenced by a greater variety of voices, including victims themselves, perpetrator, academics and legislators. Consequently, in response to the recognition of domestic violence as an ever-widening epidemic, the legal system has begun to examine its traditional approach to such violence more closely. Several types of innovative and instructive domestic violence courts have developed throughout the case-studies and their uniting feature is that they all single out domestic violence for special treatment. Examining how the case studies have dealt with the issue of domestic violence and have sought to engender the criminal justice response by addressing the needs and experiences of female victims may provide important insights for the reform of the RDP.

V. Methodology

To answer the research question set out in this thesis it is imperative that the methodology and methods utilised stand up to scrutiny. Unquestionably, it is difficult to categorise a legal thesis under any specific heading, as legal research can involve a hybrid of methods.¹⁰⁷ Henn *et al*, makes the important distinction between ‘method’ and ‘methodology’.¹⁰⁸ They state that, “method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole”.¹⁰⁹ This is important as the research strategy

¹⁰⁶ Pleck E, “*Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present*” Oxford University Press: New York, (1989), at 198 (discussing the successes and achievements of the battered women’s movement during the first decade of its existence). The battered women’s movement also broadened and strengthened feminism as a whole. *Ibid*. Whereas organizations such as the National Organization for Women (NOW), founded in 1966, catered to and mainly benefited educated, middle class women, the battered women’s movement, through shelters, provided services and education to poorer, less well-educated women. *Ibid*.

¹⁰⁷ Salter M & Mason J, “*Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research*”, Pearson: London, (2007), at 31.

¹⁰⁸ Henn M, Weinstein M & Foard N, “*A Critical Introduction to Social Research*” (2nd ED), Sage: London, (2006), at 10.

¹⁰⁹ *Ibid*.

of the thesis is doctrinal, it examines the inconsistent and inadequate treatment of FGM as a basis for refugee status, looking at both the legal and procedural contexts within which determinations are made. Consequently, the thesis adopts a comparative method, where appropriate, to examine the legislation and procedural refugee determination mechanisms in the chosen case-studies, in conjunction with the establishment of the specialised domestic violence courts to determine if their protective functions may be replicated or mirrored within the RDP.

Initially, it was my intention to try and adopt a qualitative structured interview-approach aimed at examining the experiences of FGM and other victims of gender-based violence within the RDP of my chosen case-studies. However, after consultations with my supervisors, and experts and professionals within organisations such as the Centre for Gender and Refugee Studies in the US, Amnesty International, Cherish Others in Kenya, Foyle Woman's Aid, the Canadian Council for Refugees, UNICEF Ireland, the Irish Refugee Council and many other organisations, it was felt that this was not achievable nor practical.¹¹⁰ Coupled with ethical considerations, a lack of forthcoming information from contacted organisations,¹¹¹ and the fact that FGM is a complex and sensitive issue which victims are reluctant to discuss, it was determined that it was more important to change research methods.

Thus, the scope of the thesis encompasses qualitative research of a doctrinal and comparative nature. Ian Parker has defined qualitative research as, “the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made”.¹¹² This research begins with a ‘doctrinal’ or theoretical ‘black letter law’ methodology. This means that some of the research is based on analysing the legislation and legal rules determining refugee determination within an international, regional and domestic context, and their disjunctions via examination of the case-studies, as well as existing literature. This approach enables the researcher to critically analyse the meanings and implications of these rules and the principles which underpin them. The thesis adopts

¹¹⁰ Information on file with the author.

¹¹¹ Information requests on file with the author. For a list of individuals and organisations contacted to provide information initially please refer to Appendix A.

¹¹² Parker I, “*Qualitative Research*” in Banister P, *et al* (eds), “*Qualitative Methods in Psychology: A Research Guide*”, Open University Press: Philadelphia, (1994), at 2.

a comparative method, as a means of assessing the need for reforming the RDP to make it more accommodating for FGM and in tandem other victims of gender-based violence. Moreover, as will be further discussed, the thesis also looks to other sources of optional or ‘soft law’ such as the guidance provided by the UNHCR and domestic gender guidelines to aid in the determination of refugee status.

A. Doctrinal Methodology

Doctrinal research has been defined as, “a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine”.¹¹³ This approach is suitable as the various branches of law underpinning refugee determination and gender violence are largely black letter law subjects which are based on the interpretation of statutes and cases. However, it is important to note that whilst the study of law, in this case refugee and human rights law, is based on logical conclusions, these conclusions are not an exact science. Instead they are formed of judgement, which can be influenced by other factors, such as culture, economics and politics.¹¹⁴ Whilst these overlapping factors may be described as interdisciplinary, it is possible that such research can be undertaken at differing degrees of integration.¹¹⁵ The thesis aims to be neither rigid nor looking to establish any claims to socio-legal research, rather its primary aim is to provide a thorough, in-depth examination of the inconsistent and inadequate treatment of FGM refugee claims within the RDP. By drawing upon the protective mechanisms implemented with the specialised domestic violence courts, this examination allowed me to gather examples of good practice and shortcomings, and develop key recommendations to assist lawyers, decision makers and others who interact with victims of FGM within the RDP.

An examination of the Refugee Convention, which is ratified and adopted by different member States, each with its own legal traditions, will inevitably lead the researcher to look beyond the black letter law. The thesis thus does not seek to be interdisciplinary, it is not seeking to answer the research questions from a socio-legal perspective, instead the researcher is using a set of interpretative tools and methods to bring order and to assess a

¹¹³ See, Salter & Mason, *supra* note 104, at 49.

¹¹⁴ Oliver Wendell Holmes, Jr, “*The Path of the Law*” 10 Harvard Law Review 457, (1897), at 465–6.

¹¹⁵ See, Vick D, “*Interdisciplinarity and the Discipline of Law*” 31 Journal of Law & Society 163, (2004), at 164.

particular area of the law. Once there is a clear and comprehensive system for assessment in place, the researcher will, as noted above, provide recommendations based on the findings. Therefore, the thesis does not encompass any strong interdisciplinary aspects to the research as this would expand the parameters of the thesis beyond the scope of what was intended and would render the thesis difficult to defend.¹¹⁶ Instead the thesis is firmly doctrinal in its methodology as it entails a critical, qualitative analysis of legal materials that supports a hypothesis.¹¹⁷ This approach involves identifying certain legal rules and procedures. Once identified, general principles, common themes and discrepancies will begin to emerge. This enables the thesis to identify ambiguities, criticisms and solutions which may exist within the RDP which has resulted in disparate outcomes, such as the use of gender-guidelines and potential recommendations for reform.

The main sources of data for this research will be the legal instruments themselves, including the Refugee Convention, domestic legislation, gender-guidelines and those cases and decisions generated under them. These instruments are examined in order to answer the research question. In doing so it is necessary to look at the wording and legislative history of Refugee law and provisions, specifically the UNHCR Refugee Convention. Research into the Refugee Convention and UNHCR instruments is widely accessible. In examining the legislative history of the Refugee Convention, the thesis can identify the connection between refugee and human rights law and how they have affected the treatment of gender-based violence. This examination allows the thesis to extract relevant information and demonstrate a wider understanding of the relevant issues within the RDP process and the domestic criminal justice system response to such violence within the specialised domestic violence courts.

This information has been made possible through an exploration of primary and secondary legal sources, as well as non-legal sources for investigative and supporting information. These sources came from official bodies, including the UNHCR and included treaties, statutes, regulation and decisions emanating from the courts and tribunals. The secondary background sources utilised to aid the research process, and

¹¹⁶ Hutchinson T & Duncan N, “*Defining and Describing What We Do: Doctrinal Legal Research*”, 17 *Deakin Law Review* 83, (2012), at 84.

¹¹⁷ *Ibid*, at 118.

which helped to explain, interpret and analyze my theories came from law reviews, legal treatises, encyclopedias, restatements and several other literature and web-based sources. Legal research often encompasses more than 'legal research' and this piece of research has used information from various non-legal sources including new stories, statistics and scholarship from other disciplines and professional publications. Consequently, this research has also explored both legal and non-legal databases and websites.

B. Comparative Method

Comparative law is in full flourish ... It is widely accepted as an effective means of learning about other legal cultures and improving one's own legal system... And yet: 'a taste of the big, wide world' should not tempt us to oversimplify things or regard the world as a self-service shop of legal cultures. Because again and again, we come up against strange obstacles, which dampen our exuberance.¹¹⁸

Although the approach adopted is a comparative analysis *per se*, the thesis acknowledges the dangers and the benefits of comparative work. Aristotle when comparing the Greek city States in the fourth and fifth centuries BC stated that:

As we have set out to investigate which of all is the best state-run community for people who, as far as possible, are capable of living their lives as they desire, we must also consider the other state constitutions, those which are in use in certain states ... as well as those suggested by individuals, in order to ascertain which features of them are correct and useful...¹¹⁹

It is unlikely that this meant that Aristotle was considering the complete transplantation of a constitution from one position to another. Rather, he hoped to a certain extent to be able to extract the elements, which would result in the best possible constitution for free people. In a similar vein, this admonition is vital to this thesis, as it does not intend, nor

¹¹⁸ Groffeld B, "Kernfragen der Rechtsvergleichung (Mohr/Siebeck, Tübingen 1996) pp.1, 3 (as cited by Eser A, "The Importance of Comparative Legal Research for the Development of Criminal Sciences", (2007). This document is available online at http://www.freidok.uni-freiburg.de/volltexte/3759/pdf/Eser_The_importance_of_comparative_legal_research.pdf (last accessed 28/2/17).

¹¹⁹ See, Eser, *supra* note 118.

does it profess to undertake or provide an exhaustive comparative study of the issues surrounding FGM, gender-based violence and refugee status within the various case-studies. Rather the need to compare and differentiate the phenomena emanating from the chosen case-studies for the reasons discussed earlier, enables the extraction of the elements which will firstly, generate a new way of thinking and approaching FGM, and secondly the extraction of constructive elements enables the proposal of a degree of reform of the RDP itself. This, in theory, will not only potentially make the process more accommodating for victims of FGM, but will also help to rectify the inconsistent and in some instances the inadequate treatment of such claims, which has resulted in the existing asylum lottery system. Thus, the experiences of the case-studies to be examined in this thesis offers the prospect of expanding our understanding of the problems and opportunities that accompany the protection of refugee women and interpreting the 1951 Refugee Convention in a more gender-sensitive manner.

Therefore, from a methodological perspective, comparative law is much more than a summary of laws. Its use, and application will be of the uttermost importance when making recommendations and offering practical solutions in chapter five. Some of the benefits of using this particular method of research include: firstly, a greater appreciation of the issues to be examined; secondly, an appreciation of different legal systems and cultures; thirdly, facilitation of broader learning, by examining additional issues, such as political, economic and sociological factors; fourthly, encouraging further inquiry; and finally helping to identify ‘solutions’ to remedy problems.

VI. Thesis Structure

The structure of this thesis is as follows. In chapter one the two main branches of international law, human rights and refugee law, offering protection to individuals are examined. It argues that the determination of refugee status entails contextualized, practical applications of human rights norms. However, the failures inherent in human rights law are mirrored in the decisions concerning gender-based claims for refugee status. As such, in keeping with the ultimate objective of this thesis, namely to redress the inconsistent and inadequate treatment of gender-based claims for refugee status by

decision-makers in FGM cases, this chapter explores the failures of international human rights law to adequately address human rights violations perpetrated against women, and its consequential impact on the international refugee law regime when determining such claims.

The theoretical discussions in chapter one are contextualised in the next three chapters as they examine how the US, Canada, and the UK have dealt with and attempted to remedy the inadequacies inherent within refugee law. Specifically, chapter two examines the implemented gender-guidelines which aim to provide guidance to decision makers on how to interpret the 1951 Refugee Convention definition and adjudicate asylum claims in a gender-sensitive manner.¹²⁰ The initial objective of this chapter, therefore, is to determine the common and distinctive features of the guidelines. Beyond that, this chapter also identifies issues, which the guidelines, create, expose or ignore. It queries the reluctance of their drafters to recognise certain state-sanctioned practices as potential forms of persecution, especially the practise of domestic violence. This reluctance is surprising given the fact that (as will be discussed more fully in chapter four) these countries currently operate a zero-tolerance stance in respect of domestic violence at their respective state, province, and jurisdictional levels.

Chapter three undertakes an examination of the jurisprudence emanating from my case-studies in relation to the topical and controversial gender-based practise of FGM. Fear of enforced FGM has formed the basis of several refugee claims coming before Courts in countries throughout Europe and North America, including my case study countries. This chapter examines the legal, procedural and evidential hurdles FGM claimants must surmount to be successful, and the various courts' assessments of such claims. This chapter this seeks to highlight the extent to which the gender-guidelines have redressed the disparity in women's claims. It further seeks to determine the extent to which their weaknesses impinge on the supposedly 'rectified' procedural and evidential barriers which have unremittingly undermined the fairness of decision-making in such cases.

Considering the gender-guidelines limitations and non-binding nature, coupled with biases and preconceptions of decision-makers, chapter four aims to examine how the shift in attitudes and practices towards the equally comparable practice of domestic violence

¹²⁰ Macklin, "*Cross Border Shopping*", *supra* note 104, at 26.

within the domestic criminal justice systems of the case-studies might be replicated or mirrored in some shape or form within the RDP. This innovative shift it is argued is important for two main reasons: firstly, it would ensure that States give credence to their respective gender-guidelines by singling gender-based forms of violence, in this case FGM out for special attention in separate ‘courts’, with specialised ‘gender’ processes. Secondly, this transposition will establish a through, fair and effective mechanism through which FGM claimants can present and have their claims heard in a justly gender-sensitive manner. To determine which benefits, best practices and innovations may be transposed into the refugee process so as to adequately address the complexity of FGM and in tandem correct the legal, historical and moral disparities in the protection afforded to female refugee claimants, this chapter examines several model domestic violence courts which have been developed throughout the case-studies.

As a final point, chapter five draws lessons to be learned from the US, Canadian and UK gender-guidelines and their respective specialised domestic violence courts for the RDP. To this end, this chapter will put forward a series of recommendations to redress the treatment of FGM within the RDP, advocating specifically for procedural reforms. Herein lies the major contribution of this thesis, as the thesis argues that the process in which refugee determination is made is equally (if not more) as important as the actual interpretation of the 1951 Refugee Convention definition. Considering the themes underpinning this thesis, the chapter also proposes (albeit to a limited degree) recommendations for the improvement of the interpretation of the 1951 Refugee Convention generally, including the repeated (if unrealistic) call for the inclusion of gender as an additional persecution ground and making the existing gender and credibility assessment guidelines legally binding on decision-makers. In so doing, this thesis seeks to make an important contribution to the current debates and may be of assistance to those States seeking to improve their RDP’s to ensure that *all* (and not just FGM) claimants seeking refugee status on the basis of gender-based violence are respected and that their claims are determined in a gender-sensitive and accommodating manner.

To safeguard the rights of genuine FGM claimants and to ensure that their claims are treated and interpreted in a gender-sensitive manner, it is hoped that the strategies for reforms outlined in this thesis will give rise to constructive and principled reforms within

the RDP. Like the criminal justice response to domestic violence, substantive change is required to ensure that FGM claimants can benefit from a gender-sensitive processes. Arguably, an inclusive process which challenges the status quo, respects victims and promotes a gendered approach will produce like the domestic violence courts, a fair and equitable hearing for claimants within the RDP.

Chapter One

The Development of International Human Rights and Refugee Law and the Failure to Protect Women

Introduction

Despite considerable progress over the past few decades in recognising the rights of women generally and the forging of stronger bonds so as to encourage a wider spectrum of civil society to contribute to the advancement of women and their protection from human rights abuses, the rights of women and young girls continues to be violated.¹ According to leading academics such as Niamh Reilly, despite progressive initiatives, including the Convention on the Elimination of all Forms of Discrimination against Women,² international human rights law has not yet been effectively applied to redress the disadvantages and injustices experienced by women.³ She posits that violations of women rights continued to be ignored, condoned and perpetrated by governments worldwide.⁴ A particularly clear example being gender-based violence against women, which has not been understood as a human rights issue much less as one requiring

¹ Concerns prevail that there remains a “persistence of stereotypes and conservative attitudes which have an impact on the advancement of women’s rights”. These comments were made by Silvia Pimental, chair of the CEDAW Committee during its 49th Session. See, “*Women’s Rights Violations Still Continue Despite Progress on Discrimination*”, (2011), available online via the Women’s News, Opinions and Current Affairs Website at <http://www.womensviewsonnews.org/2011/07/womens-rights-violations-still-continue-despite-progress-on-discrimination/> (last accessed 22/2/17).

² Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). Hereafter referred to as CEDAW.

³ See, Bunch C & Reilly N, “*Demanding Accountability – The Global Campaign and Vienna Tribunal for Women’s Human Rights*”, New York: Centre for Women’s Global Leadership, Rutgers University, (1999), at 2. See also, Cook R, “*Women’s International Human Rights Law: The Way Forward*”, in Cook R, “*Human Rights of Women: National and International Perspectives*”, University of Pennsylvania Press: Philadelphia, (1994), at 3. See also, *Canada v. Ward*, [1993] 2 S.C.R. 689, 733 (quoting Hathaway J, “*The Law of Refugee Status*”, Butterworths: Toronto, (1991), at 104-5 where it was said that, “*Underlying the [Refugee] Convention is the international community’s commitment to the assurance of basic human rights without discrimination Persecution, for example, undefined in the Convention, has been ascribed the meaning of “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”*”.

⁴ Bunch & Reilly, *supra* note 3, at 2.

attention from the international human rights⁵ and refugee realms. Accordingly, whilst refugee law increasingly refers to and acknowledges its foundations in a human rights paradigm,⁶ the failure of the international human rights regime, to adequately address the issue of violence against women, has resulted in what can only describe as being a ‘wondrous mess’ when it comes to determining claims for refugee status based on a gender-related form of persecution. In other words, because the international human rights paradigm has not effectively addressed human rights violations directed against women, and because States interpret key criteria of the refugee definition in light of human rights principles, women equally fail to be protected under international refugee law and they do not benefit equitably from refugee status determination.⁷ Consequently, women who are crossing borders to flee persecution often struggle to convince authorities that they deserve protection.⁸ This is evident from the developing jurisprudence on FGM as a basis for refugee status.⁹ Judicial attitudes have been characterised by overall inconsistency; some decision-makers, mindful of the immigration risks in opening a floodgate to a large group of would be refugees, have refused refugee status, on occasion defending this gate-keeping approach in the language of cultural relativism despite the applicants explicit rejection of the custom.¹⁰ In other cases an affirmation of universal human rights norms

⁵ *Ibid.*

⁶ See, Anker D, “*Refugee Law, Gender, and the Human Rights Paradigm*”, 15 Harvard Human Rights Journal 133, (2002), at 133.

⁷ This is reflected in the fact that typically there has been no gender attached to the term ‘refugee’ and limited attention until relatively recently has been focused on the protection needs of women as asylum seekers. This is further evidenced by the fact that statistics regarding the proportion of asylum-seekers who are female are often inaccurate, misleading or unavailable. See, Crawley H, “*Refugees and Gender: Law and Process*” Jordan Publishing Limited: Bristol, (2001), at 1.

⁸ In this sense, the discrediting of women in a process which purports to protect them, suggests that respect for human rights fails to be ‘universal’ and the international community’s commitment to the assurance of basic human rights without discrimination is called into question. See, Cook, *supra* note 3, at 3-4. See also, Dorling K, *et al*, “*Refused: The Experience of Women Denied Asylum in the UK*”, Women for Refugee Women: London, (2012), at 4. The reasons for this failure to enforce women’s human rights are complex and vary from country to country. They include a lack of understanding of the systemic nature of the subordination of women; the failure to recognise the need to characterize the subordination of women as a human rights violation; and a lack of state practice to condemn discrimination against women. Moreover, traditional human rights groups have been unwilling to focus on violations of women’s rights, and women’s groups have not understood fully the potential of international human rights law to vindicate women’s rights.

⁹ See, Smith A, Scott A & Nash K, “*New Critical Writings in Political Sociology: Globalisation and Contemporary Challenges to the Nation-State*”, Routledge: London, (2017).

¹⁰ *Ibid.*

has been coupled with an arrogant, even racist willingness to critique the practice and justify international normative reference.¹¹

The goal of this chapter is to explore the failures of international human rights law to adequately address human rights violations perpetrated against women generally, and how its procedural flaws, primarily a lack of procedural safeguards, have impacted upon the international refugee law regime and the determination of gender-based claims for refugee status.¹²

In this chapter (and throughout the thesis), I will examine some of the key theorists and critiques relevant to my research and associated issues. Specifically, I refer to the work of Professor Audrey Macklin, Chair in Human Rights Law, at the University of Toronto, who has produced outstanding scholarship and pro-bono work advocating for immigrant and refugee rights. She has written extensively on areas similar to my research interests, including transnational migration, citizenship, forced migration, feminist and cultural analysis, and human rights. She has written extensively on the use of the Canadian gender-guidelines to explore theoretical and practical aspects of gender-related persecution as a basis for refugee status. Influenced by her arguments and expertise as a frontline practitioner and decision-maker within the Canadian, Immigration and Refugee Board, her work has enhanced my understanding of the challenges faced by victims of gender violence navigating the RDP.

This chapter is divided into three sections. Part I examines the foundations and evolution of the international human rights regime, and highlights specifically the inadequacy of international human rights law in protecting women. The scope and purpose of this section is to explore the protection that international human rights law offers women fleeing gender-based forms of violence, including FGM. The intention here is to outline the international human rights law context and indicate the value and limitations for the protection and treatment of women. Part II provides a brief overview of international refugee law and its purpose and discusses how the failure of international

¹¹ *Ibid.*

¹² For a comprehensive discussion on the interplay between international human rights and international refugee law, *see specifically*, Harvey C, “*Time for Reform? Refugees, Asylum-Seekers, and Protection Under International Human Rights Law*”, 34 Refugee Survey Quarterly 43, (2015), at 43-60.

human rights law to adequately protect women has not only impacted upon but has also informed refugee determinations concerning women fleeing gender-based forms of persecution. Furthermore, Part III in addition to examining the unique experiences of refugee women specifically examines the difficulties that female claimants face within the domestic immigration framework. This chapter then concludes with an argument for the reform of refugee law specifically and international human rights law more generally, to effectively combat and protect the needs of women fleeing gender-based forms of violence and concurrently FGM.

I. International Human Rights Law: Women's Rights

Every person is entitled to certain fundamental human rights. Both the UN and regional human rights organizations have specifically recognized the human rights of women and the corresponding obligations of national governments to protect and promote such rights. Women's human rights are enumerated by treaties, conventions, resolutions, declarations and guidelines, promulgated by either the UN or a regional human rights body. Treaties are formally adopted by national governments and they create legally binding obligations for those governments. Every state which has ratified a human rights treaty must ensure that the human rights of its citizens are protected, meaning the government commits to both avoid and prohibit actions that violate human rights and also to undertake positive steps to ensure that such violations do not occur. Under international law, specific enforcement bodies, usually specialised agencies, committees or special rapporteurs, monitor a nation's human rights situation. These bodies also review reports and complaints concerning human rights violations, generally submitted by NGOs but also sometimes by individuals.

Based on these positive characteristics, at first glance, the international human rights regime appears to offer extensive procedural and substantive legal protection to those women whose governments have ratified existing human rights treaties. Provisions in treaties pertaining directly to women have been categorised by Natalie Hevener as falling

into the following analytic categories: protective, corrective, and non-discriminatory.¹³ Each category ultimately reflects different assumptions about women and a different conception of what constitutes, “a desirable, fair, and ultimately just status for women in society”.¹⁴ The ‘protective category’ describes the exclusionary provisions which ultimately reflect, “a societal concept of women as a group which either should not or cannot engage in specific activities”.¹⁵ In essence these types of treaties imply that women are in a subordinate position in comparison to men within society and should, therefore, be treated differently.¹⁶ While special provisions for women acknowledge the differences in women and men’s lives, ‘protective’ laws also tend to stereotype women as weak and vulnerable. Arguably, women’s rights are not necessarily paramount in such ‘protective regimes’. The protection afforded to women under such treaties is, however, of unlimited duration. The ‘corrective category’ which also identifies women as a separate group requiring special treatment, attempts to improve women’s treatment without making explicit comparisons to the situations of men. The corrective provisions, “are inclusionary rather than exclusionary, often removing a previous bar to activity”.¹⁷ Such treaties it should be noted may be of limited duration, depending on the time required to achieve the alteration required.¹⁸ Lastly, the non-discriminatory sex-neutral, category rejects the concept of women as a separate group. It reflects the idea of equal treatment between men and women.¹⁹ Non-discriminatory documents are inclusionary, since they seek to end

¹³ Hevener N, “*An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective*”, 8 Human Rights Quarterly 70, (1986), at 71.

¹⁴ *Ibid.* According to Hevener the application of these categories to the treaty provisions enables one to identify: (1) the dominate goal of the treaty, when its provisions on different issues fall into predominately one category; (2) ambiguous or even conflicting goals within the treaty when provisions fall into more than one category; and (3) historical patterns of change when provisions are compared with those of earlier documents on the same topic. *Ibid.*

¹⁵ *Ibid.*

¹⁶ An example of such treaties includes the Convention Concerning Night Work of Women Employed in Industry, Revised 9 July 1948, 81 UNTS 285 and the Geneva Convention Relating to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, articles 14, 16 and 49.

¹⁷ Hevener, *supra* note 13, at 72.

¹⁸ A key example would be the Convention on the Nationality of Married Women, Adopted 29th January 1957, entered into force 11 August 1958, 309 UNTS 65. That convention was drafted to address the not uncommon problem of involuntary loss or change of nationality of women at the time of marriage or divorce. The treaty explicitly defines the problem and identifies State obligations in this area, including that of making available, “specially privileged naturalization procedures” to alien wives of nationals. *Ibid.*, art 3, para 1.

¹⁹ A useful guide to the literature on women’s rights is Cook R & Oosterveld V, “*A Select Bibliography of Women’s Human Rights*”, 44 American University Law Review 1429, (1995).

discrimination against, or special treatment of women. But, unlike the corrective and protective provisions, they apply to all men as well as to all women, with exceptions based on issue-related qualifications rather than sex-based distinctions. They are of unlimited duration.

The current international legal system has dealt with non-discrimination on the basis of sex in both generally applicable and women-specific instruments. The right of women to equal treatment and non-discrimination on the basis of sex is part of the traditional canon of human rights. General human rights treaties at both the global and regional levels contain rights of non-discrimination on a number of bases which include sex and prohibit distinctions based on sex with respect to the enjoyment of rights.²⁰ A number of international instruments, the most comprehensive being CEDAW, also focus entirely or in large part on discrimination against women.²¹ CEDAW contains a broader definition of discrimination than those contained in earlier treaties, covering both equality of opportunity (formal equality) and equality of outcome (de facto equality).²² Sandra Fredman has argued that the conception of equality embodied in CEDAW is a

²⁰ See for example, International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter referred to as the ICCPR], articles 2, 3 and 26; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter referred to as the ICESCR], articles 3 and 7; American Convention on Human Rights, 22 November 1969, 1114 UNTS 123, article 1; African Charter of Human and People's Rights, 26 June 1981, articles 2 and 18(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, article 14 (hereafter referred to as the ECHR).

²¹ These instruments include: Convention on the Nationality of Married Women, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 November 1962, 521 UNTS 231. See also, Convention on the Political Rights of women, 20 December 1952, 193 UNTS 135 and CEDAW, *supra* note 2. For an overview of these instruments see Cook R, "Women", in Schachter O and Joyner C (eds), *The United Nations Legal Order*, Cambridge University Press: Cambridge, (1995), at 433. See also, Halberstam M & De Feis E, "Women's Legal Rights: International Covenants as an Alternative to ERA?", Transnational Publishers: Dobbs Ferry, (1987), at 18-33 & See also, Rehof L, "Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women", Martinus Nijhoff: Dordrecht, (1993).

²² Charlesworth H & Chinkin C, "The Boundaries of International Law: A Feminist Analysis", Manchester University Press: Manchester, (2000), at 217. See also, CEDAW, *supra* note 2, article 1 which defines discrimination against women as meaning:

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

transformative one.²³ She argues that transformative equality pursues four-overlapping aims: breaking the cycle of disadvantage, promoting respect for dignity and worth, accommodating difference by achieving structural change and promoting political and social inclusion and participation.²⁴ Placing these elements together highlights the connection between different types of gender equality harms.²⁵ It further highlights the expansive concept of equality and intersectional discrimination being used as the international level.²⁶ It also, however, points out some of the shortfalls in the current approach to equality.²⁷ These shortfalls pertain firstly to the articulation of the goals of substantive equality and secondly in applying them in assessing compliance by States with international obligations of equality.²⁸ The generalized, open-texture reference to equality and non-discrimination has made it possible for the interpretation of equality to evolve as the problems faced by women are better understood and as new challenges arise.²⁹ In many States, legal equality was only achieved in the first part of the twentieth century; but in a disturbing number of States, such equality and women's rights in general has still not been achieved. This is reflected in the number of reservations entered to CEDAW.³⁰ Most States formally accept the international regime³¹ but undermine their

²³ Fredman S, "Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights" in Boerefijn et al (eds.), "Temporary Special Measures", Antwerp: Intersentia, (2003), at 115.

²⁴ Fredman S, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty", 3 Stellenbosch Law Review 566, (2011), at 25, as cite in Campbell M, "CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination", (2015), available online at <http://www.scielo.br/pdf/rdgv/v11n2/1808-2432-rdgv-11-2-0479.pdf> (last accessed 8/6/17), at 493.

²⁵ Campbell, *supra* note 24, at 494.

²⁶ Fredman S & Goldblatt B, "Gender Equality and Human Rights", (2015), available online at https://www.researchgate.net/profile/Beth_Goldblatt/publication/281077241_Gender_Equality_and_Human_Rights/links/55d3ea6e08ae0a3417226f0a.pdf (last accessed 9/6/17), at 2.

²⁷ *Ibid*, at 2.

²⁸ *Ibid*.

²⁹ *Ibid*, at 3.

³⁰ *Ibid*. According to Freeman, many of the reservations entered come from States that cite Sharia law as regulating matters of personal status such as marriage, divorce, custody and inheritance. See, Freeman M, "Reservations to CEDAW: An Analysis for UNICEF", Discussion Paper, United Nations Children's Fund (UNICEF), Gender, Rights and Civic Engagement Section, Division of Policy and Practice: New York, December (2009), at 6. This paper is available online at https://www.unicef.org/gender/files/Reservations_to_CEDAW-an_Analysis_for_UNICEF.pdf

³¹ As of 9th May 2017 the ICCPR has 169 parties; the ICESCR 165; the International Convention on the Elimination of all Forms of Racial Discrimination 178; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UN Doc. A/39/51. (Hereafter referred to as the Torture Convention), has 161 parties; CEDAW has 189 & Convention on the Rights of the Child 196 (Hereafter CRC). These statistics have been taken from the United Nations Treaty Collection which is available online at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last accessed 9/5/17).

legal commitment by use of extensive reservations,³² claw-back and derogation provisions³³ which allow States to assert imperatives of national law, public safety and security³⁴ or inadequate national implementation.³⁵ Consequently, many States which have ratified these treaties are responsible for extensive human rights violations still. As Freeman puts it, such reservations ‘relegate laws and practices that critically affect women’s human rights to a system that is unreachable by and unaccountable to international norms’.³⁶

Another form of challenge focuses on the Western origins of human rights law allowing claims of cultural relativism.³⁷ For example, at the Vienna Conference on Human Rights in 1993, a number of Asian States claimed that human rights as interpreted in the West were based on a commitment to individualism and were at odds with the Asian tradition of concern with the community.³⁸ The vulnerability of human rights law to non-observance, as a result of these ‘justifiable’ limitations is exacerbated when the law touches women’s lives.³⁹ CEDAW explicitly acknowledges social and cultural norms as

³² Steiner H & Alston P, “*International Human Rights in Context*” Clarendon Press: Oxford, (1996), at 766-71.

³³ Higgins R, “*Derogations under Human Rights Treaties*”, 48 British Yearbook of International Law 281, (1976).

³⁴ See for example, ICCPR, *supra* note 20, articles 18(3), 19(3), 21 and 22.

³⁵ Charlesworth H, “*Australia’s Split Personality: Implementation of Human Rights Treaty Obligations in Australia*” in Alston P & Chiam M (eds), “*Treaty Making and Australia*”, Federation Press: Annandale, (1995), at 129.

³⁶ Freeman, *supra* note 30, at 6.

³⁷ For scholarly analysis on the issue of cultural relativism see specifically, An-Na’im A, “*Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives*”, 57 *Drake Law Review*, 829, (2009); An-Na’im A, Gort J, Jansen H & Vroom H, “*Preface*”, in An-Na’im, A, *et al*, (eds), “*Human Rights and Religious Values: An Uneasy Relationship?*”, Eerdmans Publishing: Michigan, (1995) & Bell L, Nathan A, & Peleg I, “*Introduction: Culture and Human Rights*”, in Bell L, Nathan A & Peleg I, (eds) “*Negotiating Culture and Human Rights*”, Columbia University Press, New York, (2001).

³⁸ Ghai Y, “*Human Rights and Governance: the Asian Debate*”, 15 *Australian Yearbook of International Law* 1, (1994), at 5-6. However, this governmental view should be compared with the Bangkok NGO Declaration on Human Rights, 27 March 1993, *Report of the Regional Meeting for Asia on the World Conference on Human Rights*, UN Doc. A/CONF.157/ASRM/8-A/CONF.157/PC/59, (1993).

³⁹ For instance, despite being a signatory to CEDAW since October 2000, Saudi Arabia continues to discriminate against and deny women their fundamental human rights. Described as, “not persons”, women cannot do anything, even drive, without their guardian’s permission. Such denials continue due to the fact that Saudi Arabia signed CEDAW subject to the following reservations: (1) in case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention; (2) the Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention. Paragraph 2 of article 9 reads as follows: “States Parties shall grant women equal rights with men with respect to the nationality of their children”. See, Colombo V, “*Human Rights vs. Sharia: Violence Against Women*”, (2009), available online

the source of many women's rights abuses, and obliges governments to take appropriate measures to address such abuses. Article 5(a) of the convention obliges States to:

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Arguably, by signing CEDAW, many States have tried to appear to protect and promote the rights of women, but at the same time they hesitate in modifying and reforming traditions and laws.⁴⁰

Before progressing to the next section, it should be noted that the issue of non-observance, (in other words the use of cultural relativism and reservations to justify the denial of human rights) is not unique to human rights law. This issue is imperative to this thesis as it is also one of the reasons why refugee law is failing to adequately protect women fleeing gender-based forms of violence, including FGM. Arguably, the wide margin of appreciation given to States in their interpretation of the 1951 Refugee Convention definition, gives decision-makers too much freedom and flexibility to interpret the definition in a self-serving manner. Arguably, such flexibility coupled with political considerations, particularly post 9/11 and ongoing ISIS terrorism attacks, are used as exclusion mechanisms via which States maintain control of their borders and cap the number of asylum-seekers seeking entry.⁴¹

via the ANNAQED website at <http://www.annaqed.com/en/content/show.aspx?aid=16239> (last accessed 8/2/10).

⁴⁰ For example, “women’s rights and duties” were the main issues at the June 2004 conference at the Centre Abd al-Aziz for National Dialogue in Medina, Saudi Arabia to “build and favour a culture of dialogue in Saudi society.” A surface equality was granted by the presence of 35 men and 35 women, however they discussed all issues from two different rooms connected by a closed-circuit television. The conference concluded with a clear victory for the conservative position, represented by Shaikh Abd Allah ibn al-Munief’s declaration about women’s right to drive: “If women who want to drive were like women at this conference, we would not have any doubt in allowing it. But we are dealing with teenagers... for this reason we shall be firm in our position to protect them from evil.” *Ibid*.

⁴¹ See, Heckman G, “*Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law*”, 15 *International Journal of Refugee Law* 212, (2003), at 213 (noting how States have attempted to control migration into their territories). See also, Whitaker R, “*Refugees: The Security Dimension*”, 2 *Citizenship Studies* 413, (1998), at 414-5. Whitaker notes that the, ‘refugee’ is being reconstructed in the dominant State discourses as an object of fear. At best, the redefined refugee is a maker of false or unfounded claims that must be unmasked through effective bureaucratic scrutiny. At worst, the refugee is criminalised or politicized as a threat to order.

A. Feminist Critiques of Rights

A fundamental issue in any discussion concerning women, gender violence and international human rights law is whether international formulations of rights are useful for women. A number of feminist academics have suggested, particularly within the context of national laws, that campaigns for women's legal rights are a waste of energy and at worst detrimental to women.⁴² They have argued that, while the formulation of equality rights may be useful as an initial step towards the improvement of the position of women, a continuing focus on the acquisition of rights may not be useful.⁴³ Thus, it has been argued that women's experiences and concerns are not easily translated into the narrow, language of rights.⁴⁴ In other words, rights discourse overly simplifies complex power relations and their promise is constantly thwarted by structural inequalities of power.⁴⁵ Arguably, the balancing of 'competing' rights by decision-making bodies often reduces women's power,⁴⁶ and particular rights, such as the right to the protection of the family, can in fact justify the oppression of women.⁴⁷ Consequently, feminists have examined the interpretation of rights apparently designed to benefit and protect women by national tribunals and pointed to their characteristically 'male' construction.⁴⁸ In other words, because deep-rooted laws were formulated by men with men in mind, the gender-bias inherent in such laws (which purportedly protect women) arguably remain manifestly influenced by gender stereotypes which ultimately confines women's rights and

⁴² Charlesworth & Chinkin, *supra* note 22 at 208.

⁴³ Kingdom E, "What's Wrong with Rights? Problems for Feminist Politics of Law" Edinburgh University Press: Edinburgh, (1991).

⁴⁴ West R, "Feminism, Critical Social Theory and Law" 1989 University of Chicago Legal Forum 59, (1989).

⁴⁵ Gross E, "What is Feminist Theory" in Pateman C & Gross E (eds), "Feminist Challenges: Social and Political Theory", Allen & Unwin: Sydney, (1986), at 192; Smart C, "Feminism and the Power of Law", Routledge: London, (1989), at 138-44.

⁴⁶ Smart, *supra* note 45, at 138-44.

⁴⁷ Charlesworth *et al*, "Feminist Approaches to International Law" 85 American Journal of International Law 613, (1991), at 635-8; Arzt D, "The Application of International Human Rights Law in Islamic States" 12 Human Rights Quarterly 202, (1990), at 203.

⁴⁸ Canadian feminists have made a distinctive contribution to this critique in their analysis of judicial interpretation of the Canadian Charter of Rights and Freedoms. *See for instance*, Sheehy E, "Feminist Argumentation before the Supreme Court of Canada in *R v Seaboyer*; *R v Gayme*: The Sound of One Hand Clapping" 18 Melbourne University Law Review 391, (1991), at 450; Fudge J, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada", 17 International Journal of the Sociology of Law 445, (1989). *See also*, in the US context, Olsen F, "Statutory Rape: A Feminist Critique of Rights Analysis", 63 Texas Law Review 387, (1984).

experiences to the ‘private sphere’ of life, consequently justifying certain human rights abuses committed against women.

Similar critiques have been developed by the Critical Legal Studies Movement. This movement has posited that statements of rights are indeterminate and for that reason are highly manipulable both in a technical and a more basic sense.⁴⁹ According to Hilary Charlesworth, recourse to the language of rights may give a rhetorical flourish to an argument, but provides only a momentary polemic advantage, often blurring the need for change within the social and political arenas.⁵⁰ To assert a legal right, it has been argued by Peter Gabel and Paul Harris, is to mischaracterise our social experience and to assume the inevitability of social antagonism by affirming that, “social power resides in the State rather than in people themselves”.⁵¹ The individualism promoted by traditional understandings of rights limits their possibilities by ignoring, “the relational nature of social life”.⁵² According to Charlesworth and Chinkin, talk of rights is said to make contingent social structures appear stable and permanent and to weaken the possibility of their ‘radical transformation’ the only consistent function of rights has been to protect the most privileged groups within a respective society.⁵³ It is this type of favouritism which this thesis by proposing procedural reforms based on successful domestic violence models aims to surmount within the context of the RDP. Arguably, by learning from the failure of the international human rights regime and transforming the institutional⁵⁴ and procedural safeguards⁵⁵ that surround the protection of women from human rights

⁴⁹ Charlesworth H, “What are ‘Women’s International Human Rights’?”, in Cook R, “*Human Rights of Women: National and International Perspectives*”, University of Pennsylvania Press: Philadelphia, (1994), at 60.

⁵⁰ *Ibid.* See also, Tushnet M, “An Essay on Rights” 62 Texas Law Review 1363, (1984), at 1371-2.

⁵¹ Gabel P & Harris P, “*Building Power and Breaking Images: Critical Legal Theory and the Practice of Laws*”, 11 NYU Review of Law and Social Change 369, (1983), at 375-6.

⁵² Charlesworth & Chinkin, *supra* note 22 at 209. See also, Tushnet M, “*Rights: An Essay in Informal Political Theory*”, 17 Politics and Society 403, (1989), at 410.

⁵³ Charlesworth & Chinkin, *supra* note 22 at 209. See also, Kairys D, “*Freedom of Speech*”, in D. Kairys (ed), “*The Politics of Law*”, Pantheon Books: York, (1982), at 140-1.

⁵⁴ ‘Institutional safeguards’ are features of an asylum regime that concerns the structure of the decision-making process and the nature of the decision-making bodies and their powers, including: providing decision-making authority to an independent tribunal rather than to a minister or their delegates; providing a tribunal or official a highly codified decision-making power as opposed to a broad unstructured discretion; proving a statutory appeal to an appellate authority; and proving for judicial review of a decision.

⁵⁵ ‘Procedural safeguards’ refer to the nature and content of the rights of refugee claimants to participate in the decision-making process and including providing claimants notice of the case that she must meet; allowing her the opportunity to be heard by an impartial tribunal through written representations or in person at an oral hearing; allowing her to be legally represented; allowing her to call witnesses or adduce other

violations and decision-making can *genuine* victims of FGM be adequately heard and ultimately protected within a non-discriminatory procedural process.

Feminist critiques of rights, remains a rarity in the literature pertaining to international women's rights.⁵⁶ According to Charlesworth and Chinkin "perhaps the comparatively radical, and vulnerable nature of human rights law within the international legal order has protected it from internal critique".⁵⁷ Naturally, those concerned with the protection and promotion of human rights may be reluctant to challenge the form of human rights law at a fundamental level, "fearing that such a critique may be used to reduce the hard-fought-for advances in the area".⁵⁸ Whilst the development of women's human rights, namely the development of instruments specific to women, is an important and useful approach in the protection of women internationally, questions which must be asked but which are beyond the scope of the thesis include: is this task worth the energy which it requires? And are we merely creating new sites for the subtle oppression of women?⁵⁹

Without question the development of 'women's rights' is an imperative tool in the drive to protect women within the international arena. Due to the fact that within most modern societies women operate from what can only be described as a disadvantaged or lower position than men, rights discourse "offers a recognised vocabulary to frame political and social wrongs".⁶⁰ Patricia Williams for instance in support of this assertion has pointed out that for African-Americans, talk of rights has been a constant source of hope:

Rights' feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate restructuring.....at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power.⁶¹

evidence; allowing her to cross-examine witnesses called against her or to respond to evidence detrimental to her claim; and proving her with reasons for the decision in her case.

⁵⁶ Charlesworth, *supra* note 49 at 61. See also, Engle K, "International Human Rights and Feminism" *When Discourses Meet*, 13 Michigan Journal of International Law, 317, (1992).

⁵⁷ Charlesworth & Chinkin, *supra* note 22 at 210.

⁵⁸ *Ibid.*

⁵⁹ *Ibid* (asking the same questions).

⁶⁰ Charlesworth, *supra* note 49 at 61.

⁶¹ Williams P, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" 22 Harvard Civil Rights-Civil Liberties Law Review 401, (1987), at 431.

Similarly, in parallel with African-Americans, the empowering function of rights discourse for women, particularly in the international sphere where women remain to a large degree invisible, excluded and powerless, is a crucial aspect of its value. Rights discourse has made visible human rights abuses committed against women, and in tandem increased both the power and inclusion of women in this relatively new area.

Rights discourse also offers a focus for international feminism which can translate into action if responses to women's claims are inadequate. According to Minow, it affirms "a community dedicated to invigorating words with a power to restrain, so that even the powerless can appeal to those words".⁶² Thus, the need to develop a feminist rights discourse so that it acknowledges gendered disparities of power, rather than assuming all people are equal in relation to all rights, is crucial.⁶³ The challenge therefore, according to some feminist scholars, is to invest a rights vocabulary with meanings which undermine the current "skewed distribution of economic, social and political power".⁶⁴ In non-western societies, this task may be extremely complex, for as Radhika Commaraswamy has pointed out, in South Asian regions, "rights discourse is a weak discourse", especially in the context of women and family relations".⁶⁵

The significance of rights discourse greatly outweighs its disadvantages. As such human rights "provides an alternative and additional language and framework to the welfare and protection approach to the global situation of women, which presents women as victims or dependents".⁶⁶ Thus, this rights discourse gives women the opportunity to claim their fundamental rights from the state and other specified obligation-holders. Consequently, by virtue of being a human being, women like men should be able to engage with, and contest the parameters of the human rights regime and discourse. Whilst it is important to claim their rights, and rights discourse has undoubtedly, provided women with the knowledge and energy to claim what is rightfully theirs, despite the positive

⁶² Minow M, "Interpreting Rights: An Essay for Robert Cover" 96 Yale Law Journal 1869, (1987), at 1910.

⁶³ Charlesworth, *supra* note 49 at 62.

⁶⁴ Charlesworth & Chinkin, *supra* note 22 at 211. See also, Minow, *supra* note 62, at 1910.

⁶⁵ Commaraswamy R, "To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights", in Cook R, "Human Rights of Women: National and International Perspectives", University of Pennsylvania Press: Philadelphia, (1994), at 55.

⁶⁶ Charlesworth & Chinkin, *supra* note 22 at 212. See also, Brautigam C, "Mainstreaming a gender perspective in the work of the United Nations human rights treaty bodies", Proceedings of the 91st Annual Meeting of the American Society of International Law, American Society of International Law: Washington DC, (1997), at 390.

undertones of rights discourse for women institutional and procedural discrimination and exclusion continues to hinder such progress. Institutional/procedural discrimination and exclusion in their most basic forms refer to the collective failure of States and State bodies to provide an appropriate, professional and accessible service to individuals because of their *real* or *perceived* identity which may be religious belief, political opinion, racial group, age, marital status, gender, sexual orientation, disability or dependency. Such discrimination can be seen or detected in process, attitudes and behaviour which amount to discrimination through ignorance, thoughtlessness, stereotyping and most commonly unwitting prejudice. The international community, including the UN (as already discussed) has taken steps to address the subordination position of women. Nonetheless, since it is unwilling to challenge existing statutory definitions, particularly the 1951 Refugee Convention definition, through unwitting prejudice it continues to be part of the institutional and collective failure which seriously disadvantages and discriminates against women. Such failure ultimately denies women their human rights and in some instances the protection which they seek. These failures, which have largely been replicated within the refugee context, will now be discussed in the subsequent sections and can be categorized as follows: (1) public/private dichotomy; (2) the marginalization of women's rights; (3) inadequate enforcement and implementation of provisions; and finally, (4) problems in understanding what 'equality' means. Whilst the issue of cultural relativism needs to address when examining the failure of international law (and subsequently refugee law) in adequately protecting women, this particular issue will not, however, be examined in this section as its relevance will be examined in subsequent chapters in respect of the examined FGM jurisprudence and domestic developments in respects of domestic violence.

B. The Inadequacy of International Human Rights in Affording Protection to Women

Women's human rights have been repeatedly guaranteed in numerous international treaties, declarations and conferences. Despite their existence, however, blatant and

systematic human rights violations continue to be committed throughout the world.⁶⁷ Whilst this assertion is true in respect of most if not all human rights, one would have assumed that the existing women-specific instruments would have had greater built-in procedural safeguards, particularly enforcement mechanisms which would curtail or at the very least deter egregious violations including FGM.⁶⁸ The difference in the human rights violations experienced by men and women respectively lies in the fact that women are being abused/persecuted in this manner because of their gender. Amnesty International has reported that just over 21 million people, or 0.3% of the world's population are refugees right now.⁶⁹ The UNHCR has further stated that women and girls make up around 50 per cent of any refugee, internally displaced or stateless population.⁷⁰ Such a high figure not only highlights the overwhelming need for asylum by women, it is also arguably, evidence of the failure of the international human rights law regime and governments to adequately protect women.⁷¹ In theory, human rights are intended to be indivisible, gender-neutral agreements between the State and its citizens.⁷² In reality,

⁶⁷ See, Muscati S, "Women", Human Rights Watch, (2014), available online at <https://www.hrw.org/topic/womens-rights> (last accessed 18/7/17). See also, Reilly N *et al*, "Testimonies of the Global Tribunal on Violations of Women's Human Rights", Center for Women's Global Leadership, (1994).

⁶⁸ This is due to the fact that existing women-specific instruments have been widely ratified and make advances for women's human rights. According to some leading academics, CEDAW's transcendence of the divide between first and second-generation rights acknowledges that, for women, protection of civil and political rights is meaningless without question to the social, economic and cultural context in which they operate. Charlesworth & Chinkin, *supra* note 22 at 217. Furthermore, CEDAW also identifies areas where discrimination against women is most manifest and where women most need guarantees of rights. CEDAW also attempts to highlight, address and overcome the public/private dichotomy observed in international law. In particular, it asserts women's equal rights to participate in public decision-making bodies at all levels and also affirms women's rights to equality in a limited way within the 'private' arena of the family unlike other human rights instruments which designate the family as a unit to be protected. For a list of States which have ratified CEDAW, please refer to the United Nations Entity for Gender Equality and the Empowerment of Women website at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last accessed 20/2/17).

⁶⁹ Amnesty International UK, "World leaders are spectacularly failing refugees", (2016), available online via Amnesty International UK website at <https://www.amnesty.org.uk/world-leaders-are-spectacularly-failing-refugees> (last accessed 28/11/16).

⁷⁰ See, UNHCR, "Women", (2016), available online at <http://www.unhcr.org/uk/women.html> (last accessed 29/12/16).

⁷¹ According to Lee, "the municipal law of virtually of all countries guarantees the rights of their citizens to life, liberty, equality, property, due process, etc. The mere existence of refugees.....shows that their governments have violated these rights. See, Lee L, "The Right to Compensation: Refugees and Countries of Asylum", 80 American Journal of International Law 523, (1986), at 538.

⁷² Askari L, "Girls' Rights under International Law: An Argument for Establishing Gender Equality as a *Jus Cogens*", 8 Southern California Review of Law and Women's Studies 3, (1998), at 11. See also, McCabe

however, this has arguably translated into a “contract between the state and men”.⁷³ This thesis acknowledges that men are also affected by human rights violations. It argues that because international human rights law focuses on the artificially construed ‘public sphere’ where the abuse of men prevails, this branch of law has largely ignored the abuse perpetrated against women within the ‘private sphere’, namely the home and community. Moreover, despite the plethora of comprehensive treaties and declarations delineating the human rights of all human beings, States cannot be compelled to abide by them and often do not.⁷⁴ Thus, by its very nature human rights law is vulnerable to non-observance.

Ominously, the current gendered and unenforceable status of international law leaves refugee/asylum law as the most viable instrument available to women fleeing their homes and seeking to address the violations of their human rights in other States. This is extremely problematic for several reasons. Firstly, this method unrealistically places the entire responsibility on the female claimant to escape the abuse she experiences. Secondly, refugee law itself fails to adequately cover the range of human rights abuses which women face. Thirdly, as this chapter and Chapter Three more specifically will reveal, refugee status is difficult to obtain particularly in gender-related claims. Each refugee situation is unique, including the conflict or crisis that causes the refugee outflow, the culture of the refugee-producing country, the culture of the refugee-hosting country, the length and degree of trauma, and other lifestyle changes/choices during flight. Difficulty attaining legal status as refugees and issues such as violence and access to resources are not unique to women refugees. Through a combination of these factors, however, women are made one of the most vulnerable groups in the world and face greater difficulty in obtaining protection. Refugee women, face obstacles in both meeting the definition of a refugee and documenting their status as refugees. Their gender often functions to their disadvantage. Firstly, the unique types of persecutions that women endure are not enumerated as grounds for persecution in the international legal instruments that define refugees. The 1951 Convention Relating to the Status of Refugees does not provide for a separate category for women who face gender-specific persecution

E, “*The Inadequacy of International Human Rights Law to Protect the Rights of Women as Illustrated by the Crisis in Afghanistan*”, 5 UCLA Journal of International Law & Foreign Affairs 422, (2001), at 422.

⁷³ Askari, *supra* note 72, at 11. See also, McCabe, *supra* note 72, at 422.

⁷⁴ *Ibid.*

or human rights abuses which often occur in the private sphere and the sanctity of the home. Consequently, women arguably have less of a chance of obtaining refugee status as the key criteria for being a refugee are primarily drawn from the realm of public life, which, in many societies, is still dominated by men.⁷⁵ Secondly, access to asylum procedures is a further obstacle for women. Barriers to access may be logistical, informational, cultural, or psychological. It may simply be more difficult for a woman to reach a location where she can claim asylum, as women tend to be less mobile than men and have less control over resources. Additionally, they are more likely to be solely responsible for children - and the logistics of travelling with children are more complicated than travelling alone. Furthermore, more women than men are illiterate;⁷⁶ those who have some formal education have, on average, fewer years of schooling. It may therefore be harder for them to get information about how and where to apply for asylum, or even to learn what their options are.⁷⁷ In some cultures, women are prohibited from interacting with strangers, including governmental authorities. This can be an obstacle not only to asking for asylum, but also in gaining legal assistance in doing so.

In cases where women are travelling with male relatives, it is not uncommon for the male to be treated as the “primary” asylum seeker, even if it is the women’s experiences that might more clearly fit the requirements for a grant of refugee status. They may be asked, not about their own experiences, but about those of their male relatives. In many cultures, men do not routinely discuss their activities with their wives or other women of the household. This lack of familiarity may prejudice the claims of both the women and man in a family group.⁷⁸

Severe difficulties often arise for women in refugee status determination hearings if they have experienced sexual violence, particularly FGM which is also steeped in cultural

⁷⁵ It should be noted, however, that the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has encouraged the states to consider women who are subjected to particular human rights violations to be covered under the “social group”, but it is left to the discretion of countries to follow these recommendations (UNHCR, “*Guidelines for the Protection of Refugee Women*”, EC/SCP/67, Geneva, July 1991, paragraph 53/ I a).

⁷⁶ Newland K, “*Seeking Protection: Women in Asylum and Refugee Resettlement Process*”, *Issue Paper for the United Nations Division for the Advancement of Women, Expert Consultation on Migration and Mobility and How this Movement Affects Women, Malmo, Sweden, 2-4 December, 2003*, January (2004), available at <http://www.un.org/womenwatch/daw/meetings/consult/CM-Dec03-EP8.pdf> (last accessed 30/7/17).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

and tradition. In such instances, women may be reluctant to speak about their ordeals, particularly to male interviewers or through male interpreters, or in the presence of other family members, as sexual violence is viewed in some societies as a source of shame. Furthermore, having to recount some experiences may become another source of trauma for women, which decision-makers may not understand. Coupled with the exclusion of gender as a persecution ground, the difficulty of proving credibility, cultural relativism arguments and the psychological problems associated with certain forms of abuse, women unquestionably have greater hurdles to overcome when seeking refugee status. These difficulties will be discussed in detail in Chapter Three in respects of the case-law pertaining to FGM-related refugee claims. In order to understand why these difficulties exist for woman, the following section will now examine how the public/private dichotomy, in law and society, impacts women's enjoyment of fundamental human rights.

1. The Public/Private Distinction

Like the clear majority of national legal systems, international human rights law operates largely within the confines of what Eve McCabe describes as being “the artificially constructed ‘public’ sphere, that is, within the world of government, politics, economics, and the workplace”, areas which are traditionally associated with men”.⁷⁹ However, as previously mentioned, most forms of violence directed against women occur within the private sphere. Men unquestionably, can and will continue to be victims of private violence also, but it is characteristically not as part of a pattern of gender-based violence.⁸⁰ As many renowned feminist scholars have argued the operation of public/private distinctions in international law, and indeed refugee law, provides an example of the way in which the law can factor out the realities of women's lives and experiences.⁸¹ As Hilary Charlesworth argues

⁷⁹ McCabe, *supra* note 72, at 427. *See also*, Charlesworth H, “*Feminist Methods in International Law*”, 93 *American Journal of International Law* 379, (1999), at 382.

⁸⁰ McCabe, *supra* note 72, at 427.

⁸¹ Charlesworth, “*Feminist Methods in International Law*”, *supra* note 79 at 382.

the assumption that underlies all law, including international human rights law, is that the public/private distinction is real: human society and human lives can be separated into two distinct spheres. This division, however, is an ideological construct rationalizing the exclusion of women from the sources of law.⁸²

Catherine O'Rourke has described the complexity of public and private harms as constituting a "web of harms".⁸³ In fact, the public/private distinction is pliable; it can be defined, refined and re-defined. Governments also play a role in constructing the separation of public and private life.⁸⁴ This distinction assumes that governments should not interfere in the private lives of its citizens, and according to McCabe implies that the 'private' sphere is uninhibited.⁸⁵

According to Sullivan, the law constructs and ultimately sustains power relations within the private sphere through both active regulations, for examples taxation systems, and through the failure to regulate other conduct in private life.⁸⁶ In fact, while the parameters of public life is not uniform and what is public in one society is private in

⁸² Charlesworth, "*Feminist Approaches to International Law*", *supra* note 47, at 629.

⁸³ See O'Rourke C, "*Gender Politics and Transitional Justice*", Routledge: Oxon, (2013), at 38.

⁸⁴ McCabe, *supra* note 72, at 428.

⁸⁵ *Ibid.* In fact, this assumption could not be further from the truth as governments interfere in their citizen's private lives all the time. In the UK for example the proposed introduction of identification cards and accompanying National Identity Register has proved controversial. In the current climate, it is not surprising that the political will to introduce ID cards remains strong. The terrorist outrages of 11 September 2001 and the subsequent "war on terror" have been the catalyst for a raft of legislative measures in both the US and the EU which significantly strengthen the powers available to the state to intrude on the private lives of its citizens, in the interests of national security. The ID card scheme and accompanying National Identity Register proposed by the Government's draft Identity Cards Bill will involve the collection, storage and sharing of a vast amount of information about each and every one of us – including "biometric" information such as iris scans, fingerprints, facial dimensions and even DNA profiles. This information may well be cross-referenced with other databases such as the Police National Computer or the proposed new Children's Database. Such cards however, will infringe the privacy rights of UK citizens. Another example where governments have interfered in the private lives of their citizens is evident in the recent turn-about which saw governments introducing legislation legalising same-sex marriages in some States. Thus, the state's intervention in these two-particular areas illustrated their attempt to control the behaviour of their citizens and crosses the boundary between the public and private spheres. In fact, Professor Olsen has argued that the concept of state intervention itself is incoherent and redundant, because the, "state constantly defines and redefines the family and adjusts and readjusts family norms", and thus it, "makes no logical sense to consider the policies referred to as 'non-intervention' any less interventionist than many policies referred to as 'intervention'. See, Olsen F, "*The Myth of State Intervention in the Family*" 18 Michigan Journal of Law Reform 835, (1985), at 842.

⁸⁶ Sullivan D, "*The Public/ Private Distinction in International Human Rights Law*" in Peters J & Wolper A, (eds), "*Women's Rights, Human Rights: International Feminist Perspectives*", Routledge: New York, (1995), at 128.

another,⁸⁷ the common feature of the public/private distinction is the attribution of “a lesser value to the activities of women within what is defined as private life”.⁸⁸

The tension between the contending factions as to the proper jurisdiction of international human rights law, namely whether the law should govern the relationship between governments and their citizens, or relationships between individuals as well, “embodies this artificial distinction between the so-called ‘public’ sphere of politics, government and the state, and the ‘private’ sphere of home and family”.⁸⁹ Those who argue that international human rights law should not ‘intervene’ in the ‘private’ sphere argue that international law should only govern the way that a nation treats its citizens, and not how citizens treat each other. However, such a decision leaves women in an extremely vulnerable position, as they will be subjected to extreme forms of harm within the home and family without any remedy or international source of protection.⁹⁰

The public/private distinction, which has so deeply affected international human rights law has also been reproduced in refugee law.⁹¹ As will be discussed more fully in Chapters Two and Three, the bars to women’s eligibility for refugee status lie not solely in the legal categories *per se* (i.e., the non-inclusion of gender or sex as one of the five grounds) but also in the incomplete and gendered interpretation of refugee law: the failure of decision-makers to “acknowledge and respond to the gendering of politics and of women’s relationship to the state.”⁹² To illustrate this point, even in cases that fit the traditional paradigms of refugee law, women have been denied refugee status in many instances, largely because the physical harm involved was sexual. A clear example of this

⁸⁷ Charlesworth H, “*Human Rights as Men’s Rights*”, in Peters J & Wolper A (eds), “*Women’s Rights, Human Rights: International Feminist Perspectives*”, Routledge: New York, (1995), at 103.

⁸⁸ *Ibid.*

⁸⁹ McCabe, *supra* note 72, at 429.

⁹⁰ *Ibid.*

⁹¹ Anker, *supra* note 6, at 140. *See also*, Charlesworth & Chinkin, *supra* note 22, at 3-4. An alternative feminist critique – that the public/private distinction can be overemphasised – also has been made in the refugee context. Greatbatch J, “*The Gender Difference: Feminist Critiques of Refugee Discourse*”, 1 International Journal of Refugee Law 518, (1989), at 520 (“The public/private dichotomy roots women’s oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances, and the inter-connections of the public and private spheres”).

⁹² Kelly N, “*Gender-related Persecution*”, 26 Cornell International Law Journal 626, (1993), at 642 (suggesting an interpretive framework which, *inter alia*, examines “the political nature of seemingly private acts”). *See also*, Greatbatch, *supra* note 91 at 526 (evaluating feminist critiques of refugee law and suggesting a human rights approach which, *inter alia*, addresses the refugee’s relationship to her state); Indra D, “*Gender: A Key Dimension of the Refugee Experience*”, 6(3) Refuge 3 (1987).

approach is the US case of *Campos-Guardado*,⁹³ where a Salvadoran woman, raped by government vigilantes after being forced to watch anti-government family members being hacked to death, was denied asylum on the basis that the attackers reprisals against her were ‘personally motivated’ and was a form of private violence.⁹⁴ Thus, the distinction between ‘personal/private’ harm on the one hand and ‘public’ oppression on the other had reproduced the dichotomy between the domestic, traditionally female sphere and the societal, male public arena.⁹⁵ As the *Campos-Guardado* case illustrates, persecution arising out of harm in the ‘personal/private’ sphere has traditionally been held to fall outside of the scope of the Refugee Convention. Similar stances, as will be discussed in Chapter Three, have been taken in respects to FGM.⁹⁶ The following section will now examine how effective laws and policies have been in promoting the rights of and protecting women.

2. Inadequate Enforcement and Implementation

Although States are bound by treaty and customary international human rights law, the effective implementation of provisions relating to women and the enforcement mechanisms between States or by the UN are minimal. CEDAW, which focuses solely on the specific suffering and disadvantage faced by women has been described as the “definitive international legal instrument requiring respect for and observance of the human rights of women”.⁹⁷ Its aims are to eliminate discrimination and establish gender equality through challenging structural gendered power relations. But if its aspirations are supercilious, in relation to enforcement its wings were initially severely clipped.⁹⁸ Prior to the introduction of the Optional Protocol there was no mechanism through which individuals could complain to the Committee about the violation of their rights under

⁹³ *Campos-Guardado v. INS*, 809 F.2d. 285 (5th Cir. 1987) (U.S.).

⁹⁴ *Ibid*

⁹⁵ See, Smith *et al*, *supra* note 9.

⁹⁶ See, Chapter Three.

⁹⁷ Cook R, “*Reservations to the Convention on the Elimination of all Forms of Discrimination against Women*”, 30 Virginia Journal of International Law 643 (1990) at 643.

⁹⁸ Hodson L, “*Women’s Rights and the Periphery: CEDAW’S Optional Protocol*”, 25 The European Journal of International Law 2, (2014). This article is also available online at <http://www.ejil.org/pdfs/25/2/2506.pdf> (last accessed 9/2/17).

CEDAW.⁹⁹ Instead, a reporting procedure and an inter-state complaints mechanism were relied upon to secure States' compliance with their treaty obligations. The flaws and weaknesses of such enforcement systems are now well known.¹⁰⁰ In common with other UN human rights treaties, CEDAW's inter-state complaints mechanism has never been used.¹⁰¹ As for the reporting procedure, this is generally accepted as a means of reviewing national implementation rather than an enforcement mechanism: Chinkin has argued that its nature 'constrains the Committee from exploring issues in depth'.¹⁰² Poor compliance by States with reporting obligations is notorious under all international human rights treaties, and CEDAW has been no exception.¹⁰³ The Committee initially met for only a two-week period each year - a uniquely short allocation of time - and consequently experienced a huge backlog in dealing with reports. Although authorized now to meet three times a year, workload problems persist.¹⁰⁴ Furthermore, CEDAW is encumbered with the honour of being the most heavily reserved international human rights treaty,¹⁰⁵ indicating weak adherence to its normative principles.

In contrast to CEDAW, other mainstream human rights instruments offer a range of monitoring techniques. The ICCPR, the Torture Convention and the Race Convention all contain two other monitoring mechanisms: the right of complaint by one State against another for violation of the treaty¹⁰⁶ and the right of individual communication to the

⁹⁹ See, Interview with Alison Symington: *How can women use the Optional Protocol of CEDAW?* (2001), available online at <http://dawn.thot.net/cedaw.html> (last accessed 18/12/09) (describing the Optional Protocol as an enforcement mechanism).

¹⁰⁰ For a first-hand account of the difficulties faced by the Women's Committee in enforcing the Convention in its early years see Evatt E, "*Finding a Voice for Women's Rights: The Early Days of CEDAW*", 34 *George Washington International Law Review* 515 (2002).

¹⁰¹ See, UNHCR, "*Human Rights Bodies – Complaints Procedures*", (2017), available online at <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (last accessed 10/6/17). See also, Hodson, *supra* note 98, at 563 noting that CEDAW's inter-state complaints mechanism has never been used). See further, Connors J, "*Optional Protocol*", in Freeman M, *et al* (eds), "*The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*", Oxford University Press, Oxford (2012), at 443 - 447.

¹⁰² Chinkin C, "*Violence Against Women*", in Freeman *et al* (eds), "*The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*", Oxford: Oxford University Press, (2012), at 443-73.

¹⁰³ See, Byrnes A, "*The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of All Forms of Discrimination Against Women*", 14 *Yale Journal of International Law* 1 (1989).

¹⁰⁴ Hodson, *supra* note 98, at 563.

¹⁰⁵ Cook, *supra* note 97 at 644.

¹⁰⁶ ICCPR, *supra* note 20, article 41; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, G.A. Res. 2106A (XX), U.N. GAOR, 660 U.N.T.S.

treaty monitoring body.¹⁰⁷ These procedures are adopted at the discretion of the State party. The reason for the distinction in monitoring procedures between for the example the Race Convention and CEDAW according to Laura Reanda is not clear.¹⁰⁸ She posits that it may have been on account of the belief that, “the condition of women, embedded as it is in cultural and social traditions, does not lend itself to fact-finding mechanisms and complaints procedures such as those developed in the human rights sphere”.¹⁰⁹ While this view point can certainly be understood, unfortunately it does not allow the bias that arguably lies at the heart of violence against women in the sphere of international law to be eroded. Arguably, whilst CEDAW has been active in monitoring reports and in issuing recommendations, it has undeniably been hampered by resources ever more limited than those of other treaty-monitoring bodies.¹¹⁰

The Optional Protocol¹¹¹ was adopted in 1999 and entered into force on 22 December 2000.¹¹² The protocol allows for Communications to be ‘submitted on behalf of individuals or groups of individuals, with their consent, unless it can be shown why that consent was not received’. The inclusion of an inquiry procedure, further empowered the CEDAW committee to inquire into and report on ‘reliable information indicating grave or systematic violations by a State Party’ of the Convention.¹¹³ While States may opt out

195 (hereinafter referred to as the Race Convention), article 11; Torture Convention, *supra* note 31, article 21.

¹⁰⁷ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976, article 1; Race Convention, *supra* note 106, article 14; Torture Convention, *supra* note 31, article 22.

¹⁰⁸ Reanda L, “*The Commission on the Status of Women*”, in Alston P, (ed), “*The United Nations and Human Rights: A Critical Appraisal*”, Clarendon Press: Oxford, (1992), at 274.

¹⁰⁹ *Ibid.*

¹¹⁰ See, Burrows N, “*International Law and Human Rights: The Case of Women’s Rights*”, in Campbell T *et al* (eds), “*Human Rights: From Rhetoric to Reality*”, Bail Blackwell: York, (1986), at 93-5; Byrnes, *supra* note 103; Meron T, “*Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*”, 84 American Journal of International Law 213, (1990), at 214; Shin H, “*CEDAW and Women’s Human Rights: Achievements and Obstacles*” (2004), at 5-9. This paper which was presented at the Castan Centre for Human Rights Law’s Annual Conference in December 2004 is available online at <http://www.law.monash.edu.au/castancentre/events/2004/heisoo-shin-paper.pdf> (last accessed 18/12/09).

¹¹¹ For a complete list of Parties and Signatories to the Optional Protocol please refer to the United Nations Treaty Collection at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (last accessed 8/5/17).

¹¹² Isa FG, “*The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women: Strengthening the Protection Mechanisms of Women’s Human Rights*”, 20 Arizona Journal of International & Comparative Law 291 (2003), at 309.

¹¹³ See, McCabe, *supra* note 72, at 433.

of this obligation, only four to date have done so.¹¹⁴ Compromises reached during the drafting process also resulted in States not being bound to remedy violations, but rather to give ‘due consideration’ to the Committee’s views and recommendations. However, this was ameliorated somewhat by Article 7(5), which authorizes CEDAW to adopt follow-up procedures in respect of communications. Further, Article 5 empowers the Committee to adopt interim measures to prevent ‘irreparable damage’ to a victim. Hogan argues that the Optional Protocol was therefore a compromised but nonetheless welcome development, providing an enhanced opportunity for the Women’s voices to be heard.¹¹⁵ Since the emergence of the Optional Protocol it could be argued that CEDAW may be viewed as being placed on an equal footing with certain other international human rights instruments, such as the Torture Convention, which allows for individual complaints. The adoption of the Optional Protocol is therefore a significant step towards an equal valuation of women’s rights, however, the problems inherent within the Convention render it susceptible to failure. Coupled with the relatively weak language of the Convention, State reservations and the limited monitoring provisions provided for, further legislative, institutional and procedural reforms are needed to ensure that victims of gender-based violence, including those subjected to FGM are adequately protected and heard.¹¹⁶ Questionably, if such international instruments aimed at eliminating discrimination and establishing gender equality are effectively rendered futile, the gender equality and non-discrimination principles emanating from them will be upheld by State parties in a piecemeal manner. Evidently, as will now be discussed further, the ostensibly gender-neutral nature of the RDP and the current ‘asylum lottery’ in FGM cases are clear examples of this.

3. Problems in Understanding what ‘equality’ means

¹¹⁴ The States concerned are Bangladesh, Belize, Colombia, and Cuba.

¹¹⁵ Hodson, *supra* note 98, at 564.

¹¹⁶ For a more comprehensive discussion on protection against discrimination, the human rights machinery; state reporting procedures and individual complaint procedures please refer to, Byrnes A, “*The Committee on the Elimination of Discrimination against Women*”, (2013), in Hellum A & Sinding Aasen H, “*Women’s Human Rights*”, Cambridge University Press: Cambridge, (2013) at 27- 63.

Another factor inhibiting the protection of women under international human rights law is that existing laws identify sexual equality with equal treatment.¹¹⁷ CEDAW requires that women be accorded rights equal to those of men and that women can enjoy all their rights and entitlements in practice. While international human rights treaties refer to ‘equality’, in other sectors the term ‘equity’ is often used. The term “gender equity” has sometimes been used in a way which perpetuates stereotypes about women’s role in society, suggesting that women should be treated “fairly” in accordance with the roles that they carry out.¹¹⁸ This understanding risks perpetuating unequal gender relations and solidifying gender stereotypes that are detrimental to women. The CEDAW Committee has emphasized in its General Recommendations and Concluding Observations on different countries, that State parties are, “called upon to use exclusively the concepts of equality of women and men or gender equality and not to use the concept of gender equity in implementing their obligations under the Convention”.¹¹⁹ As the legal term used in the Convention, gender equality cannot be replaced by equity, which is a concept conditioned by subjective criteria.¹²⁰

Some stakeholders have also favoured the language of equity on the misunderstanding that gender equality means the same or identical treatment of men and women, rather than considering the actual circumstances of men and women.¹²¹ As explained above, substantive equality, which is the standard to be met under human rights law, requires

¹¹⁷ For a comprehensive discussion on issues pertaining to equality within the context of international, national and domestic laws please see, McColgan A, “*About Discrimination, Equality and the Law*”, Hart Publishing: London, (2016); Freedman S, “*Engendering socio-economic rights*”, in Hellum A & Sinding Aasen H, “*Women’s Human Rights*”, Cambridge University Press: Cambridge, (2013) at 217-42. See also, Charlesworth & Chinkin, *supra* note 22 at 229.

¹¹⁸ In development parlance, “equity” is a term commonly used to speak about inequalities on a variety of grounds, not only on sex. The word “equity” has sometimes been understood as more accessible to a broader public and suggests a need for redistribution. However, some have suggested that the term should be used with caution to ensure it is not masking a reluctance to speak more openly about discrimination and inequality. See, e.g., Joint Monitoring Programme for Water Supply and Sanitation of the World Health Organization (WHO) and the United Nations Children’s Fund (UNICEF), Equity and Non-Discrimination Working Group, especially its “*Background note on MDGs, non-discrimination and indicators in water and sanitation*”, available from www.wssinfo.org/post-2015-monitoring/working-groups/equity-and-non-discrimination/ (last accessed 28/4/17).

¹¹⁹ Office of the United Nations High Commissioner for Human Rights, “*Building on achievements: women’s human rights five years after Beijing*”, (2010) paras. 9–22. This document is available online at <http://www2.ohchr.org/english/bodies/chr/special/contribeijing.htm> (last accessed 9/1/17).

¹²⁰ *Ibid.*

¹²¹ UNHCR, “*Women’s Rights are Human Rights*”, (2014), at 34. This report is available online at <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> (last accessed 1/3/17).

measures to achieve equality of results. This may mean that women and men are not always treated in exactly the same manner, in order to redress historical discrimination and/or take account of women's biological differences. Thus, the fundamental problem for women is not primarily discriminatory treatment compared with men, but rather the fact that women are in a subordinate position due to the fact that they lack economic, social and political power in both the public and private spheres.¹²²

Consequently, even the broad definition of discrimination provided for in CEDAW may not have much impact on the violations experienced by women across the globe. The non-discrimination approach of CEDAW was translated directly from the Race Convention.¹²³ Although the adoption of this approach can be understood as a strategy to ensure the international acceptability of CEDAW, the appropriateness of the model is questionable. Indeed, one of the obstacles faced by women at the international level according to Charlesworth and Chinkin is the consensus at the State level that racial oppression is much more serious than gender oppression.¹²⁴ The discrimination prohibited by CEDAW is, for the most part,¹²⁵ confined to accepted human rights and fundamental freedoms. According to Chinkin *et al*, if these rights and freedoms are defined in a gendered manner, access to them “will be unlikely to promote any real form of equality”.¹²⁶

Thus, the male-centric view of equality in international law is further reinforced by the focus in CEDAW on public life, the economy, the legal system and education, and its limited recognition that oppression within the private sphere, contributes to the inequality suffered by women.¹²⁷ For instance, CEDAW does not explicitly prohibit violence against women. Perhaps this failure is a result of the conceptual difficulty of squeezing a harm

¹²² Charlesworth & Chinkin, *supra* note 22 at 229.

¹²³ *Ibid*, at 230. See also, Reanda, *supra* note 108, at 286 & Burrows, *supra* note 110, at 86-8.

¹²⁴ Charlesworth & Chinkin, *supra* note 22 at 230. This approach is well illustrated by the comment of an Indian delegate at the 1985 Copenhagen UN Mid-Decade for Women Conference that, since he has experienced colonialism, he knew that it could not be equated with sexism. Quoted in Bunch C, “*Passionate Political Essays 1968-1986: Feminist Theory in Action*”, St. Martin's Press: New York, (1987), at 297.

¹²⁵ The exception being article 6 which places an obligation of state parties to suppress all forms of traffic in women and exploitation of prostitution of women.

¹²⁶ Charlesworth & Chinkin, *supra* note 22 at 230. CEDAW's endorsement of affirmative action programmes in article 4 similarly assumes that these measures will be temporary techniques to allow women eventually to perform exactly like men.

¹²⁷ CEDAW, *supra* note 2, article 5.

characterised as private into the public framework of the Convention, or because this does not fit directly into the equality model.¹²⁸ In its General Recommendation no.19, CEDAW described gender-based violence as a form of discrimination against women, thereby underlining the significance of the private sphere as an area for the subjugation of women.¹²⁹

In 1995, the Beijing Declaration and Platform for Action detailed the international understanding of women's equality. Equality it was determined (as previously discussed) is generally presented as women being treated in the same way as men, with little consideration of whether or not existing male standards are appropriate. The Platform called for the equal participation of women in all areas of life. According to Otto, however, despite the desire to place women on an equal footing with men, the assumption appears to be that inequality is removed once women participate equally in the decision-making arena.¹³⁰ This account thus, ignores the underlying power relations and structures which contribute to the oppression of women.

At present, it seems that international law affords women no adequate basis for the protection of their human rights. Many of the abuses women face, such as FGM, are still deemed to fall into an artificially constructed 'private' realm of life that is for the large part ungoverned by current international law. To the extent that treaties are in place to set out and protect women, not only do State parties fail to comply with their provisions, but there are also no adequate enforcement mechanisms to enforce the treaties. For these reasons, and those discussed above, current international law is failing to adequately protect women. According to Colin Harvey, there remains a worry that the potential strength and specificity of refugee protection might be undermined in well-intentioned efforts to promote human rights.¹³¹ This worry, as the following discussion shows is very real. Like its human rights counterpart, refugee law is also inadequate in affording protection to women fleeing FGM and other gender-based forms of violence. In fact, it is

¹²⁸ Charlesworth & Chinkin, *supra* note 22 at 231.

¹²⁹ *Ibid.* See also U.N. Doc. A/47/38, CEDAW/C/1992/L.1/Add.15.

¹³⁰ Otto D, "Holding up Half the Sky, but for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women", 6 Australian Feminist Law Journal 7, (1996), at 19.

¹³¹ *Ibid.* See also, Hathaway J, "Leveraging Asylum", 45 Texas International Law Journal 503, (2010), at 503-36; Hathaway J & Pobjoy J, "Queer Cases Make Bad Law", 44(2) New York University Journal of International Law and Policy 315, (2012), at 315-389.

the overwhelming need by women for refugee protection which demonstrates the failure of international human rights law to protect them and calls for reform of refugee law and human rights law to create a system which will adequately protect and enforce their rights.¹³²

II. Women and Refugee Law

A. The Law and its Purpose

The fundamental purpose of refugee law is to provide surrogate international protection when there is a fundamental breakdown in State protection resulting in serious human rights violations tied to civil and political status.¹³³ The human displacement resulting from World Wars I and II led to the adoption of international agreements to protect refugees.¹³⁴ Today, the international law on refugees consists of the Statutes of the Office of the UN High Commissioner for Refugees,¹³⁵ the 1951 Convention Relating to the Status of Refugees,¹³⁶ and the 1967 Protocol Relating to the Status of Refugees.¹³⁷ In addition to these binding international instruments, many other international and regional agreements also address the needs of refugees. The UDHR and the Declaration on Territorial Asylum also guarantee the right to asylum, but they are non-binding treaties and not legally enforceable. In addition, there are also several regional agreements dealing with the rights of refugees such as the Organisation of African Unity's Convention

¹³² See, McCabe, *supra* note 72, at 436.

¹³³ *Ibid.* See also, *See In re R-A*, Interim Dec. 3403, at 7 (BIA 1999).

¹³⁴ The first such protections were extended by the League of Nations after World War I to Russian and Armenian refugees. The post World War II era saw the adoption of the Universal Declaration on Human Rights in 1948 which guarantees the right to seek asylum from persecution. See, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948) (hereinafter referred to as the UDHR). The UN originally established the International Refugee Organisation (IRO) and the UN Relief and Works Agency for Palestinian refugees to deal with problems resulting from displacement. The UN High Commissioner for Refugees replaced the IRO in 1950.

¹³⁵ Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. GAOR, 5th Sess., Annex, U.N. Doc. HCR/INF/1/Rev.3 (1950) (hereafter referred to as the UNHCR Statute).

¹³⁶ International refugee law is based on the Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, and the Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.N.T.S. 6223, 606 U.N.T.S. 267 (together hereinafter referred to as the 1951 Convention or the Refugee Convention).

¹³⁷ Protocol Relating to the Status of Refugees, Jan 21st, 1967, 19 U.N.T.S. 6223, 606, U.N.T.S. 267 (hereafter referred to as the Refugee Protocol).

Governing Specific Aspects of Refugee Problems in Africa,¹³⁸ the Organisation of American States' Caracas Convention on Diplomatic Asylum, and the Caracas Convention on Territorial Asylum.¹³⁹ In 2004 the European Union, also adopted European Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees and persons otherwise in need of international protection. It aimed firstly to ensure that member States apply common criteria for the identification of persons genuinely in need of international protection Secondly, it aimed to ensure that a minimum level of benefits is available for these persons in all EU member States.¹⁴⁰

The Statute of the UNHCR has adopted a three-prong definition for who constitutes a refugee. First, it includes those individuals who were considered refugees under either: The Constitution of the International Refugee Organisation or the Arrangements of the 12th May 1926 and 30 June 1928, the Conventions of 28th October 1933 and 10th February 1938, and the 14th September 1939.¹⁴¹ Second, it includes those who, due to the events occurring before January 1st, 1951, are outside their country of nationality, have a well-founded fear of being persecuted because their race, religion, nationality, or political opinion, and are unable to seek protection from their own government.¹⁴² Third, the statute

¹³⁸ This Convention defines 'refugee' identically to the 1967 Refugee Protocol but expands it to include those fleeing 'external aggression, occupation, foreign domination or events seriously disturbing public order'. Organisation of African Unity: 1969 Convention on Refugee Problems in Africa, article 1, Sec.2, U.N.T.S. No. 14, 691. (Hereafter referred to as the African Refugee Convention).

¹³⁹ In neither of these OAS treaties is there a clear definition of whom the Conventions were meant to protect. The Caracas Convention on Territorial Asylum states that member States may protect those who are persecuted for their beliefs, opinions or political affiliations. The Caracas Convention on Territorial Asylum, 29th December. 1954, article 2, OAS Official Records, OEA/SER.X/1, Treaty Series 34. The Caracas Convention on Diplomatic Asylum is even more vague as it states asylum may be granted for political offences. The Caracas Convention on Territorial Asylum, 29th December 1954, article 1, OAS Official Records, OEA/SER.X/1, Treaty Series 34.

¹⁴⁰ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection. (Hereafter referred to as European Council Directive 2004/83/EC). Directive 2004/83/EC does take the encouraging step of explicitly recognizing persecution by non-state actors and gender-based persecution. Directive 2004/83/EC also includes a state obligation to provide subsidiary protection status for individuals who are not eligible for protection as a refugee but who demonstrate, under the Directive's Article 2(e): "*substantial grounds ... for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.*"

¹⁴¹ UNHCR Statute, *supra* note 135, at Ch 2, S6(i).

¹⁴² *Ibid*, at Ch 2, S6(ii).

extends protection to those who meet the requirements of the second definition but removes the temporal limitation of January 1st 1951.¹⁴³

The Refugee Convention has adopted only the first two parts of the UNHCR refugee definition.¹⁴⁴ It recognised as refugees those individuals with a well-founded fear of persecution on account of their race, religion, nationality or political opinion due to events occurring before 1951.¹⁴⁵ According to the statute, the UNHCR has authority to protect refugees irrespective of any dateline.¹⁴⁶ Therefore, an individual who meets the requirement of the statute qualifies for protection by the UNHCR regardless of whether or not he or she is recognised as a refugee under the Refugee Convention.¹⁴⁷

The Refugee Protocol serves to broaden further the Refugee Convention refugee definition by removing the limitation that allowed refugee status for individuals fleeing events which occurred before January 1st, 1951.¹⁴⁸ In addition, the Refugee Protocol expanded the refugee definition even further by including the new persecution ground ‘membership in a particular social group’.¹⁴⁹ The Refugee Protocol also adopted all of the articles of the Refugee Convention so that those States that are contracting parties to the Refugee Protocol but never ratified the Refugee Convention are essentially parties to the Convention as well.¹⁵⁰

As the controlling international convention on refugee law, the Refugee Convention establishes the definition of a refugee as well as the principle of non-refoulment and the rights afforded to those granted refugee status. Thus, a claimant must show that he or she has: firstly, a well-founded fear of persecution; secondly, ‘for reasons of race, religion, nationality, membership of a PSG, or political opinion’; thirdly is ‘outside of the country of his nationality/habitual residence’; and fourthly is ‘unable or unwilling to avail himself of the protection of that country’. Persons who for some reason or another do not fulfil

¹⁴³ *Ibid*, Ch2, SB.

¹⁴⁴ Refugee Convention, *supra note* 136, article 1, Sa(1)-(2).

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid*.

¹⁴⁷ United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1992), paras 15-16. (UNHCR Handbook).

¹⁴⁸ Refugee Protocol, *supra note* 137, article 1(2).

¹⁴⁹ *Ibid*. Hereafter referred to as PSG.

¹⁵⁰ UNHCR Handbook, *supra note* 147, para 9. For example, the US never ratified the Refugee Convention but it did ratify the Refugee Protocol. As a result, it has undertaken to apply the substantive provisions of the Refugee Convention, absent the 1951 dateline.

the criteria in this definition do not qualify as refugees and are therefore not entitled to the protection provided by the 1951 Convention. A large proportion of the people in the third world commonly referred to as “refugees” are thus excluded from the refugee protection regime established by the 1951 Convention as natural catastrophes, war, or economic or political chaos are not considered persecution for the purposes of obtaining refugee status. Another large category excluded from the refugee protection regime are internally displaced persons, that is, persons who have fled, for example human rights abuses or civil war but are still within their country of origin.¹⁵¹ Moreover, since there has been no gender attached to the term ‘refugee’ and limited attention (until recently) has been focused on the protection needs of women as asylum seekers, women who are subjected to gender-based forms of violence are also largely excluded from the refugee protection regime.¹⁵²

There is increasing evidence that refugee women may be unable to benefit equitably from protection and assistance efforts. Although some States, as will be discussed in Chapter Two have begun to recognise the specific needs of female refugee claimants and have taken measures to ensure their access to protection and material assistance, much more still needs to be done to respond to the ways in which gender shapes the experience of those seeking refugee status.¹⁵³ From the perspective of violations of women’s human rights two issues are particularly problematic when it comes to fulfilling the criteria in the refugee definition. Firstly, the fact that gender is not included among the grounds of persecution in the Convention, and second, the requirement of lack of state protection in relation to abuses committed by non-state actors. The fact that gender is excluded as a persecution ground has traditionally led to interpreting the refugee definition without having regard to women’s experiences of persecution. Even though women and men often experience similar types of persecution and are often persecuted on similar grounds, women are also subject to both types of violence and persecution that are specific to their gender and are persecuted because of their gender.¹⁵⁴ The failure to appreciate the

¹⁵¹ See, The Guiding Principles on Internal Displacement, UN doc. E/CN.4/1998/53/Add.2 (11 Feb. 1998), Introduction, para. 2.

¹⁵² Crawley, *supra* note 7 at 1.

¹⁵³ *Ibid.*

¹⁵⁴ See generally, Crawley, *supra* note 7, Chapter 1.

differences between the nature and experiences of persecution faced by women and men respectively often results in not recognising (gender-specific) violence faced by women as persecution or misunderstanding the (gender-related) grounds of persecution. Even where women fear persecution for the same reasons as men, the form of persecution may be specific to their gender (e.g., rape or other sexual violence) and not as readily recognised as ‘persecution’ within the meaning of the Convention. Alternatively, the persecution may be gender-neutral (e.g., stoning or beatings) but the reasons (e.g., failure to comply with social mores) are not recognised as grounds for persecution. Moreover, female victims of sexual violence, may find it difficult to talk about their experiences to a male interviewer, or are reluctant to identify the true extent of the persecution or harm suffered because of shame.¹⁵⁵ Thus, women’s claims for protection are undermined because of definitional and procedural issues.

Moreover, as the international human rights regime began to address the protection needs of women, questions relating to women, gender-related persecution and refugee status also increased in intensity, receiving an increasing amount of attention from academics and more lately from international organisations and some governments. Thus, whilst it is now recognised that gender can influence or dictate the type of persecution/harm suffered as well as the reasons for such treatment,¹⁵⁶ calls for the addition of gender as a persecution ground¹⁵⁷ are therefore no longer heard, and the UNHCR has concluded that the refugee definition, as “properly interpreted”, covers gender-related claims and that there is no need for an additional persecution ground.¹⁵⁸

Even though the UNCHR is a considerable authority when it comes to interpreting the Refugee Convention, its guidelines are intended to provide “legal interpretive guidance”¹⁵⁹ for governments, and many States accept direct or indirect participation by the UNHCR in procedures for the determination of refugee status.¹⁶⁰ The Refugee

¹⁵⁵ Luopajarvi K, “*Gender-Related Persecution as Basis for Refugee Status: Comparative Perspectives*” Abo Akademi University, Finland, Institute of Human Rights Research Report No 19, (2003), at 2.

¹⁵⁶ *Ibid*, at 3. See also, Guidelines on international protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HRC/GIP/02/01, 7 May 2002 (hereafter referred to as the UNHCR Gender Guidelines), para 6.

¹⁵⁷ Cipriani L, “*Gender and persecution: protecting women under international refugee law*”, 7 Georgetown Immigration Law Journal” 7 Georgetown Immigration Law Journal 511, (1993).

¹⁵⁸ UNHCR Gender Guidelines, *supra* note 156, para. 6.

¹⁵⁹ Luopajarvi, *supra* note 155, at 3.

¹⁶⁰ Goodwin-Gill, “*The refugee in international law*,” (2nd ed), Clarendon Press, (1996), at 33.

Convention thus leaves States the choice of means regarding implementation of the Convention at the national level. This results in varying interpretations of the refugee definition and its different elements. For example, some States have accepted that women may constitute a ‘PSG’ under some circumstances, whereas other States are firmly of the opinion that gender does not fall under the ground ‘PSG’. Another issue where States have come to completely opposing interpretations of the refugee definition is the issue of persecution by non-state actors; where the common-law systems as a rule do not have a problem with accepting violations committed by non-state actors as persecution, some civil law systems quite consistently deny that such treatment may constitute persecution.¹⁶¹

These concerns, which are both substantive and procedural, have been one of the main driving forces behind this thesis and will be examined in detail in Chapter Two. However, before examining in depth how international refugee law, like its human rights counterpart has failed to adequately protect women, it is firstly imperative that we examine the unique experiences of refugee women generally, and the attempts which have been made by the refugee protection regime to address the protection needs and concerns of female claimants. This general focus provides a context for examining the experiences and hurdles faced by FGM claimants within the RDP in Chapter Three.

B. The Experiences of Refugee Women

Refugee women suffer the same deprivation and hardship which is common to all refugees and they are commonly persecuted for reasons like their male counterparts. Many are targeted because they are political activists, members of women’s movements or persist in demanding that their rights or the rights of others are respected and adequately protected.¹⁶² In the clear majority of cases, however, the experiences of women differ significantly from those of men because women’s activism, resistance and political protest may manifest itself in different ways to those of men.¹⁶³ According to Heaven Crawley,

¹⁶¹ Luopajarvi, *supra* note 155, at 3

¹⁶² Crawley, *supra* note 7 at 1.

¹⁶³ For instance: (1) women may hide people, pass messages or provide community services, food, clothing and medical care; (2) women may be targeted because they are particularly vulnerable, for example those

women along with their dependents are all too often the first victims of, “political, economic and social repression in significant part because of laws and social norms which dictate gender-related behaviour and treatment”.¹⁶⁴ Furthermore, governments in some States may exploit family relations to intensify harm. For instance, women may be tortured, held as substitutes for relatives and in some instances even killed as governments attempt to exert their power and will over those closely connected to them.¹⁶⁵ Furthermore, an attack on a woman may also represent an attack on her ethnic group at large; because women have a reproductive role, women may be viewed as the quintessence of a given identity’s maintenance.¹⁶⁶

In many of the scenarios identified above, gender-based forms of violence are inflicted by the perpetrator themselves. Rape is a common method of torture inflicted on women, but it should be noted that sexual violence takes many forms and may also include, verbal humiliation, threats of violence acts or forced acts intended to degrade women. Sexual violence, “constitutes a particularly humiliating assault and one which often carries traumatic social repercussions which range from shame and social stigma to reprisals by relatives”.¹⁶⁷ Such gender-specific forms of violence are additional to non-gender specific forms of violence and can have significant implications in the RDP both substantively and procedurally.¹⁶⁸ For this reason, gender-based forms of violence, specifically FGM forms an important focus for this thesis.

A further issue which also needs to be addressed concerns the need to recognise as refugees those who suffer persecution within their own home borders because of their sexual identity. Throughout the world, women who do not live up to the moral or societal standards imposed on them by their respective societies can also be subjected to cruel and

who are young, elderly, or disabled; (3) women who do not conform to the moral or ethical standards imposed on women may suffer cruel or inhuman treatment; (4) women may be persecuted by family or community members; and finally (5) women may be subjected to human rights violations simply because of the fact that they are the wives, mothers or daughters of individuals who the authorities consider to be ‘dangerous’ or ‘undesirable’. *Ibid.*, at 3.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ See, Siemens M, “*Protection of Women Refugees*” 56 *Refugees* 22, (1988), at 22 where it is stated that, “*In conflicts between different political or religious groups, sexual violence against women has been used as a means of aggression towards an entire section of the community or as a means of acquiring information about the activities and location of family members*”.

¹⁶⁷ *Crawley, supra note 7*, at 3.

¹⁶⁸ *Ibid.*

other horrendous forms of inhuman treatment. For instance, a refusal to adhere to dress codes, pre-marital sex and even an unsatisfactory dowry may result in various forms of persecution, including bride burning, or even death.¹⁶⁹

To a large degree, the international refugee regime is founded on an ability to move, however, due to structural conditions and cultural patterns (including economic and social constraints), relatively few women have been able to flee to other countries to seek protection.¹⁷⁰ Yet, for those women who have managed to flee and cross borders, their experiences all too often tend to be interpreted as, “discriminatory as opposed to persecutory”.¹⁷¹ Thus, Crawley posits that this implies that women are refused refugee status for reasons that seem to have less to do with refugee law than with the gender of the asylum applicant.¹⁷² In most western countries, including the UK, it has been stated that approximately one-third of asylum seekers are female yet statistics show that in some countries (if those statistics are available) women are less likely to be granted refugee status than men.¹⁷³ As Spijkerboer suggests, the authorities in some countries might justify such statistics by claiming that women are less deserving, or that women tend to be denied refugee status more frequently than men as they tend to be less involved in the public sphere, namely political activities.¹⁷⁴

Protection is at the heart of the responsibility that the international community bears towards refugees. Female refugee claimants, as the above discussion reveals are disadvantaged by refugee law and are vulnerable to actions that threaten their protection. International protection entails taking all necessary measures to ensure that refugees are adequately protected and effectively benefit from their rights. Like its human rights counterpart, the international refugee regime as the following discussion will now

¹⁶⁹ *Ibid.* See also, Koutsoukis J, “India Burning Brides and Ancient Practice is on the Rise”, (2015), available online via the Sydney Morning Herald at <http://www.smh.com.au/world/india-burning-brides-and-ancient-practice-is-on-the-rise-20150115-12r4j1.html> (last accessed 24/2/17).

¹⁷⁰ See, Tuitt P, “Rethinking the Refugee Concept” in Nicholson F & Twomey P (eds.) “*Refugee Rights and Realities: Evolving International Concepts and Regimes*”, Cambridge University Press: Cambridge, (1999), at 110-3; Barnett L, “Global Governance and the Evolution of the International Refugee Regime” 14 *International Journal of Refugee Law* 238, (2002), at 256.

¹⁷¹ Crawley, *supra* note 7, at 4.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Spijkerboer T, “*Women and Refugee Status: Beyond the Public/Private Distinction*”, Emancipation Council: The Hague, (1994).

examine has also addressed the issue of gender persecution and has also attempted to address the protection needs of female claimants.

C. International Recognition and Response to the Need for Protection of Women

Faced with the hurdles of interpretation, credibility and procedural constraints among others, female claimants who have been subjected to FGM and other forms of gender-based persecution face the risk of being denied protection. Consequently, existing international refugee instruments have become the subject of scrutiny and heated debates for their lack of provisions recognising gender as a valid ground upon which a well-founded fear of persecution may be based¹⁷⁵ as well as for the lack of clear guidance for state interpretation to classify gender as one of the existing categories of the 1951 refugee definition.¹⁷⁶ In response to this criticism, the UNHCR has begun to evaluate the provisions of these instruments in an attempt to address and remedy many of the issues of gender-based persecution and violence as they pertain to female refugees. These will now be addressed.

¹⁷⁵ See, Greatbatch, *supra* note 91; Bower K, "Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group" 7 *Georgetown Immigration Law Journal* 173 (1993); Aleinikoff A, "The Meaning of Persecution in United States Asylum Law" 3 *International Journal of Refugee Law* 5, (1991); Schenk T, "A Proposal to Improve the Treatment of Women in Asylum Law: Adding a 'Gender' Category to the International Definition of 'Refugee'" 2 *Indiana Journal of Global Legal Studies* 301, (1995); Thiele B, "Persecution on Account of Gender: A Need for Refugee Law Reform" 11 *Hastings Women's Law Journal* 221, (2000); Macklin A, "Refugee Women and the Imperative of Categories" 17 *Human Rights Quarterly* 213, (1995). See also, International Women's Tribune Centre *et al*, Integrating Women's Human Rights into Deliberations of the 1993 United Nations World Conference on Human Rights and into the Ongoing Work of the United Nations" 8 (1993) (calling on the 1993 World Conference on Human Rights to consider, modifying the 1951 Convention and the 1967 Refugee Protocol definitions of refugee to encompass gender-based persecution), as cited in Peters T, "International Refugee Law and the Treatment of Gender-Based Persecution: International Initiatives as a Model and Mandate for National Reform" 6 *Transnational Law and Contemporary Problems* 225, (1996), at 236, note 68.

¹⁷⁶ See, Grahl-Madsen A, "The Status of Refugees in International Law", A.W. Sijthoff: Leiden, The Netherlands, (1972), at 219. Madsen posits that the PSG category is intended to be constructed more broadly than other categories. He also posits that this provision was intended to allow the addition and protection from persecution of classes that had not yet been foreseen. Teresa Peters argues that Madsen's theory is backed up by Arthur Helton, who reports that the Swedish delegation to the 1951 Refugee Convention insisted upon the PSG category due to the fear that the other categories would not address, "all the reasons for persecution an imaginative despot could conjure up". See, Helton A, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status" 15 *Columbia Human Rights Law Review* 39, (1983) & Peters, *supra* note 175, at 236, note 69. Further analysis of the social group category and its history can be found in Fullerton M, "A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group" 26 *Cornell International Law Journal* 202, (1993).

In 1985 the Executive Committee of the UNHCR issued Conclusion No. 39¹⁷⁷ which recognised that female refugees constituted the majority of the world refugee population and that many of them were exposed to special problems in the international protection field.¹⁷⁸ That conclusion served primarily to recognise officially that female refugees were (and continue to be) “in a vulnerable situation which frequently exposes them to physical violence, sexual abuse and discrimination” and that a need exists for a greater understanding of the circumstances faced by women.¹⁷⁹ In addition to seeking measures to protect female refugees from violence and sexual abuse,¹⁸⁰ Conclusion No. 39 further affirmed that States may recognise gender-based persecution as a valid ground for obtaining refugee status.¹⁸¹

In 1988, the NGO on Refugee Women organised the first international consultation on refugee women. The objectives behind the consultation were to provide a forum for the discussion of the issues facing the international community insofar as refugee women were concerned, and to produce a resource book¹⁸² for those within the community addressing these problems.¹⁸³ In addition to recommending that States recognise that women may be persecuted on account of their gender, the consultation also recommended increased international dedication to eliminating, punishing, and preventing violations of women’s rights.¹⁸⁴

¹⁷⁷ UNHCR, “*Refugee Women and International Protection*”, para 205, U.N. Doc. A/AC.96/673 (1985). (Hereafter referred to as Conclusion No. 39). Conclusion No. 39 is available online via the UNHCR: The UN Refugee Agency website at <http://www.unhcr.org/41b041534.html> (last accessed 27/1/17).

¹⁷⁸ *Ibid*, Para C.

¹⁷⁹ *Ibid*, Para D.

¹⁸⁰ Paragraph E of Conclusion No. 39, “*Stressed the need for such protection to receive the urgent attention of Governments and of the UNHCR and for all appropriate measures to be taken to guarantee that refugee women and girls are protected from violence or threats to their physical safety or exposure to sexual abuse or harassment*”. *Ibid*, Para E.

¹⁸¹ It provided that, “*in the exercise of their sovereignty, states are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention*”. *Ibid*, Para K.

¹⁸² See, NGO Working Group on Refugee Women, “*Working with Refugee Women: A Practical Guide*” UNHCR: Geneva, (1989).

¹⁸³ See, Kelley N, “*Report on the International Consultation on Refugee Women, Geneva, November 15-19, 1988, With Particular Reference to Protection Problems*” 1 *International Journal of Refugee Studies* 233, (1989), at 233.

¹⁸⁴ As such, the Consultation called on all signatory States to international refugee documents to, “*develop standards and criteria for the adjudication of asylum claims.... recognizing the necessity to determine the extent to which the actions of women... are seen by governments as resistance to political systems and/or religious beliefs:... and create reliable documentation systems that would include background information*

That same year the UNHCR Executive Committee issued its second report on refugee women,¹⁸⁵ which effectively advocated the inclusion of refugee women in the development and implementation of UNHCR guidelines. The 1990 UNHCR Executive Committee report on refugee women reiterated this recommendation, calling for States to ensure that the needs and resources of refugee women are fully understood and integrated. It further called for States to promote measure for improving the international protection of refugee women. Specifically, it called for the full and active participation of refugee women in the planning, implementation and evaluation/monitoring of all sectors of refugee programs. The report further, requested the representation of female staff at all levels and asked that where necessary, skilled female interviewers within the RDP be made available.¹⁸⁶

The UNHCR Guidelines were developed and adopted in 1991 called for the recognition of gender-based violence and discrimination as grounds for a finding of refugee status within the terms of the Refugee Convention and the Refugee Protocol.¹⁸⁷ Furthermore, the guidelines established procedures and practices to sensitize the RDP to the experiences of female refugees¹⁸⁸, as recommended by the Executive Committee Reports.

In keeping with the developments in international refugee and human rights law, in 1993, the Executive Committee of the UNHCR further issued Conclusion No. 73, which called upon State parties to the Refugee Convention and the UNHCR to ensure the equal access of women and men to refugee status determination procedures.¹⁸⁹ In addition, the Conclusion supported the recognition as refugees of persons with a well-founded fear of

on the situation of women in countries of origin, and on the incidence of sex-directed persecution". Ibid, at 233-6.

¹⁸⁵ *Report of the United Nations High Commissioner for Refugees Executive Committee*, 39th Sess., para 26, U.N. Doc. A/AC.96/721 (1988).

¹⁸⁶ *Report of the United Nations High Commissioner for Refugees Executive Committee*, 41st Sess., U.N. Doc. A/AC.96/760 (1990), Para 23 (a)(i)-(iii).

¹⁸⁷ UNHCR, "Guidelines for the Protection of Refugee Women", *supra* note 75.

¹⁸⁸ The guidelines urge implementation of procedures such as further education of administrators and judges on the particular situation of women in their home land. *Ibid*, Para. 73; education as to gender issues in general for translators and interviewers, *ibid*, Para 75; and increased hiring of women in all aspects of asylum determination and application. *Ibid*.

¹⁸⁹ *Refugee Protection and Sexual Violence*, UNHCR, Executive Committee Conclusions, No. 73, Para. (c) (1993).

persecution through sexual violence.¹⁹⁰ Whilst sharing the basic needs of all those who seek protection and refugee status, and in recognising that female claimants have particular needs and suffer specific forms of persecution on account of their gender, Conclusion No. 73, also recognized gender inequality as a social system of subjugation and disadvantage, which is itself at odds with the norms and ideals of international human rights law. Unfortunately, however, the Executive Committee of the UNHCR, has not yet addressed the issue of creating a gender category within the 1951 international refugee definition, as it feels that there is no need. According to the UNHCR, even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, it has been claimed, therefore, covers gender-related claims.¹⁹¹ In addition to the issue of gender, there have been calls for the Refugee Convention to be reformed generally. Refugee rights advocates argue that its definition of a refugee is too narrow¹⁹² and that it doesn't clearly spell out states' obligations beyond the principle of non-refoulement.¹⁹³ They also point out that it lacks an enforcement mechanism, so its application largely relies on the good faith of signatory States.¹⁹⁴ Governments have also criticized the Convention for being out of step with the current era of mass migration.¹⁹⁵ Undoubtedly, the Refugee Convention is a limited

¹⁹⁰ *Ibid*, Para D. In recognizing that women refugees often experience persecution differently from refugee men, the UNHCR Executive Committee noted, “*with grave concern the widespread occurrence of sexual violence in violation of the fundamental right to personal security as recognised in international human rights and humanitarian law, which inflicts serious harm and injury to the victims, their families and communities, and which has been a cause of coerced displacement including refugee movements...*”. *Ibid*, Introductory remarks.

¹⁹¹ See, UNHCR, “*Summary Conclusions – Gender-Related Persecution, Global Consultations on International Protection*”, (2001), San Remo Expert Roundtable, 6-8 September 2001, nos.1 and 3. This document is available online at <http://www.refworld.org/docid/470a33b60.html> (last accessed 18/7/17).

¹⁹² IRIN, “*Has the Refugee Convention Outlives its Usefulness*”, (2012). This document is available online via the Inside Story on Emergencies website at <http://www.irinnews.org/analysis/2012/03/26/has-refugee-convention-outlived-its-usefulness> (last accessed 18/7/17).

¹⁹³ Siegfried K, “*Time to Reform the Way We Protect Refugees?*”, (2016). This document is available online via the Inside Story on Emergencies website at <http://www.irinnews.org/analysis/2016/05/09/time-reform-way-we-protect-refugees> (last accessed 18/7/17).

¹⁹⁴ *Ibid*.

¹⁹⁵ The UK and Australia for instance are among those that have argued it provides an avenue for irregular migrants to circumvent visa and border controls. See, Millbank A, “*The Problem with the 1951 Refugee Convention*”, Social Policy Group: Australia, (2000) & The Guardian, “*Blair’s Migration Speech*”, (2004).

document in many respects, not least in terms of gender. Jeff Crisp, former head of policy development and evaluation at UNHCR has stated that the UNHCR has been under pressure to reconvene the Convention for the past 10 to 15 years, but their position has always been that we don't want to reopen the discussion because we'd end up with something worse than what we have at the moment.¹⁹⁶ Hathaway has maintained that the problem is not with the Convention itself, but due to "a complete failure by UNHCR and states to innovate the way we actually deliver protection".¹⁹⁷ Concurring, this thesis posits that reform is need to address the issue of gender within the RPD.

Despite its reluctance to add gender as a persecution ground, the UNHCR has recognized sexual violence and the transgression of social mores as forms of gender-based persecution that, if used in conjunction with one of the existing enumerated categories could potentially qualify a person for refugee status.¹⁹⁸ In 1996, the Executive Committee of the UNHCR further issued Conclusion No. 79 which addressed the needs of refugee women specifically.¹⁹⁹ It encouraged the UNHCR to strengthen its efforts for the protection of women having a well-founded fear of persecution and called on States to adopt an approach that was gender-sensitive to those seeking refugee status based on a well-founded fear of persecution, including sexual violence.²⁰⁰

In September 2001, the San Remo Expert Roundtable²⁰¹ addressed the question of the meaning of 'membership of a PSG' in the refugee definition, as contained in the Refugee

This speech which was delivered to the Confederation of British Industry on migration is available online via The Guardian website at <https://www.theguardian.com/politics/2004/apr/27/immigrationpolicy.speeches> (last accessed 18/7/17).

¹⁹⁶ See, IRIN, "Has the Refugee Convention Outlives its Usefulness", *supra* note 192.

¹⁹⁷ *Ibid.*

¹⁹⁸ Thiele, *supra* note 175, at 233.

¹⁹⁹ *General Conclusion on International Protection*, UNHCR, Executive Committee Conclusions, No 79 (1996). (Hereafter referred to as Conclusion No. 79)

²⁰⁰ Conclusion No. 79 stated that the Executive Committee:

"Recalls its request that UNHCR support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women, welcomes in this context the convening by UNHCR in February 1996 of the Symposium on Gender-Based Persecution, the purpose of which was to share information on States' initiatives in this respect, and encourages UNHCR to continue and strengthen its efforts for the protection of women having a well-founded fear of persecution; and calls on states to adopt an approach that is sensitive to gender-related concerns and which ensures that women whose claims to refugee status are based upon a well-founded fear of persecution for reasons enumerated in the 1951 Convention and its 1967 Protocol, including persecution through sexual violence or other gender-related persecution, are recognized as refugees". Ibid, Para O.

²⁰¹ The San Remo Expert Roundtable addressed the question of the meaning of 'membership of a PSG' in the refugee definition, as contained in the 1951 Convention Relating to the Status of Refugees. The

Convention. Several summary conclusions were established. It was reiterated that the 1951 Refugee Convention is founded on the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. The Roundtable acknowledged that because men, women, and children can experience persecution in different ways, Article 1A(2) of the Refugee Convention demands an inquiry into the needs of the individual claimant. While it was determined that gender can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment, it was determined that the refugee definition, as properly interpreted, can encompass gender-related claims.²⁰² As such, it was determined that there would be no need to include gender as an additional persecution ground within the 1951 Refugee Convention definition.²⁰³ The inclusion of gender as an enumerated persecution ground is important for a number of reasons; firstly as an enumerated persecution ground it would mean that States would have to recognise exclusively gender-based forms of persecution directed against women, thus in some instances challenging the cultural relativism argument. Secondly, it would mean that gender-based forms of persecution will no-longer be wrongly categorised under other enumerated persecution grounds. Thirdly, such a ground would give substance and strength to existing international and domestic gender-guidelines which are non-binding. Finally, in keeping with the aims of CEDAW and international human rights law generally, such a ground would give positive affirmation to the principle of equality by requiring States parties to take all measures to develop and advance the human rights of women on a basis of equality with men.²⁰⁴

discussion was based on a background paper by T. Alexander Aleinikoff, Migration Policy Institute and University of Georgetown, entitled “*Membership in a Particular Social Group*”: Analysis and Proposed Conclusions’. In addition, roundtable participants were provided with written contributions from Justice Lory Rosenberg, US Board of Immigration Appeals, Deborah Anker, Harvard Law School, and James C. Hathaway, University of Michigan, and subsequent comments were received from the US Government, and Joan Fitzpatrick, University of Washington. Participants included thirty-three experts from twenty-three countries, drawn from governments, NGOs, academia, the judiciary, and the legal profession. Lee Anne de la Hunt, from the University of Cape Town Legal Aid Clinic, moderated the discussion. See, Feller E, *et al*, “*Refugee Protection in International Law: UNHCR’S Global Consultations on International Protection*”, Cambridge University Press: Cambridge, (2003), at 312.

²⁰² See, Global Consultation on International Protection, “*Summary Conclusion: Gender-Related Persecution*” (2001), Paras 1-3. This document is available online at <http://www.unhcr.org/publ/PUBL/419db5b44.pdf> (last accessed 9/10/07)

²⁰³ *Ibid*, Para 1.

²⁰⁴ CEDAW, *supra* note 2, Article 3.

Significantly, however while the San Remo Roundtable decided not to include gender as an additional persecution ground, it was nevertheless determined that sex could constitute a PSG.²⁰⁵ It was further determined that in cases where there is a real risk of serious harm at the hands of a non-state actor for reasons unrelated to any Convention ground, and the lack of State protection is for reason of a Convention ground it would generally be recognised that the nexus requirement inherent in the refugee definition is satisfied.²⁰⁶ Furthermore, it was acknowledged that the main problem facing female refugee claimants was the failure of decision-makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women.²⁰⁷ Most importantly, it was determined that the protection of refugee women not only requires a gender-sensitive interpretation of the refugee definition, but also a gender-sensitive refugee status determination procedure.²⁰⁸ Such procedural reforms as will be discussed throughout this thesis, would effectively serve to redress the inconsistent treatment of gender-based claims for refugee status.

Awareness and appreciation of the issues affecting women within the RDP has been enhanced by guidelines on gender-related persecution. In 2002, the UNHCR issued its Guidelines on International Protection on gender-related persecution.²⁰⁹ These guidelines gave effect and recognition to the Summary Conclusion of the Expert Roundtable at San Remo, in that they are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.²¹⁰ They aim specifically to protect female claimants and make the RDP more accommodating to meet their specific needs.

Following years of neglect of the needs of female claimants within the RDP, the aforementioned developments indicate a new awareness and willingness by the UNHCR

²⁰⁵ Global Consultation on International Protection, “*Summary Conclusion: Gender-Related Persecution*” (2001), *supra* note 202, Para 5.

²⁰⁶ *Ibid*, Para 6.

²⁰⁷ *Ibid*, Para 4.

²⁰⁸ *Ibid*, Para 8.

²⁰⁹ See, UNHCR Gender Guidelines, *supra* note 156, para 6. These Guidelines aimed to complement the UNHCR Handbook and to replace the UNHCR’s Position Paper on Gender-Related Persecution and result from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in San Remo in September 2001

²¹⁰ *Ibid*, Preamble.

to take gender into account in policy development and implementation. As such, the steps taken over the past two decades by the UNHCR in recognising the specific needs of refugee women has been a welcome development, which to a large degree in theory helps to legitimise the factual basis for women's refugee claims. Thus, in conjunction with international human rights law, international refugee law has also recognised and focused its attention on gender-specific human rights abuses inflicted on women because of their gender and in turn has extended their interpretation of the Refugee Convention to women making claims on this basis.²¹¹

Unfortunately, however, despite these promising and positive developments the UNHCR materials do not have the force of law or form part of the Refugee Convention or Protocol and therefore cannot override the express terms of domestic immigration acts or rules. Thus, these international developments are only effective to the extent that States are willing to comply and implement their initiatives. Many considerations may defend the decision not to implement or support these provisions and recommendations, the most prominent being the perception that such provisions infringe upon State sovereignty.²¹² Consequently, despite the strides made within the international refugee arena by the UNHCR, its materials merely provide, "guidance and are aids to interpretation of the Refugee Convention and may be relevant to the exercise of a broad discretion".²¹³ Coupled with many of the same criticisms levelled against the international human rights regime, and the non-binding nature of UNHCR documents, international refugee law, like its human rights counterpart is fraught with deficiencies which ultimately work against women seeking refugee status. The result, as will now be discussed is that, women fleeing gender-based forms of violence are all too often denied protection.

D. Inadequacies of International Refugee Law for Women

²¹¹ Crawley, *supra* note 7, at 12.

²¹² See, Katz N, "*INS Says Rape, Mutilation is a Personal Problem*", The Plain Dealer, May 22, 1994, at 1C (quoting Gregg Beyer). See also Fennell T, "*Finding New Grounds for Refuge*" MACLEAN'S, August 8, 1994, at 18 (describing a Somali Woman's grant of asylum in Canada and the reaction of the Somali community in Canada to the ruling as offensive to the Muslim faith, under the tenants of which FGM often takes place).

²¹³ Crawley, *supra* note 7, at 13.

In pursuit of its ideal that “human beings shall enjoy fundamental rights and freedoms without discrimination”,²¹⁴ international refugee law has developed to protect those individuals who are unjustly persecuted in their homelands and unprotected by their governments. However, the current standards for granting refugee status are overly narrow and insufficient to protect women who live in fear of/or who have been subjected to gender-based persecution. As discussed thus far, the rights of women are often overlooked due to a refugee definition which fails to encompass the type of persecution that women often suffer, particularly within the private sphere of society.²¹⁵ In this section and elaborating on the above discussions, I will now discuss the inadequacies of international refugee law in affording protection to female claimants generally. Essentially, women and young girls are unable to benefit equitably from international protection available under the Refugee Convention, for several reasons: (1) gender-bias and the marginalization of women’s experiences; (2) difficulties in interpreting the refugee convention definition; and (3) procedural and evidential barriers.

1. Gender Bias and the Marginalization of Women’s Experiences

It is assumed that international law is objective and that international norms directed at individuals within States are universally applicable and gender-neutral. However, the Refugee Convention, as it is currently interpreted, presents considerable difficulties for women whose fears of persecution arise out of forms of protest or ill-treatment not considered ‘political’ or deserving of international protection. Whilst international refugee instruments make no distinction between male and female refugees, their interpretation by the State, at both the international and national levels, reflect and reinforce gender biases, so much so that women’s experiences are all too often relegated to the private sphere: the result being that their claims are not interpreted in a gender-sensitive manner. It should be noted that the restriction on women’s ability to participate

²¹⁴ Refugee Convention, *supra* note 136, Preamble.

²¹⁵ Some commentators contend that such a formulation of persecution denies women's experiences outside the private sphere and erects an impenetrable wall between the social and private realms. *See* Greatbatch, *supra* note 91. However, a conception of persecution which includes social persecution does not necessarily preclude women's claims based on political persecution. The other categories of the Refugee Convention would still apply to women who suffer persecution for those reasons. Expanding the definition merely extends protection to those women whose persecution is outside the scope of the convention.

equally within the public sphere of life is most prevalent in non-western societies with strong traditional, cultural and religious underpinnings, but such restrictions can also exist in 'developed' Western States. In many respects, the failure to incorporate the gender-related claims of women seeking refugee status is a:

product of the general failure of refugee and asylum law to recognise social and economic rights and its emphasis instead on individual targeting and specific deprivation of civil and political rights.²¹⁶

This is even though social and economic rights may also be violated for political reasons. However, this failure, as previously discussed is related to the larger criticism of human rights law and discourse: that it privileges male-dominated public activities over the activities of women which take place within the private sphere. The result being that, the criteria for determining refugee status are drawn from the realm of public sphere activities dominated by men.²¹⁷ In the context of a largely male-oriented body of law, women's cases are consequently, formulated in ways which reflect the decision-makers understanding of law rather than the reality of the claimant's experiences.²¹⁸

Coupled with the failure of the UNHCR to incorporate gender as an additional persecution grounds,²¹⁹ efforts to ensure adequate protection for female claimants are further undermined where practitioners and decision-makers do not properly comprehend the concept of gender or understand what is meant by gender-based persecution. While the available literature on the experiences of refugee women has been important in

²¹⁶ Crawley, *supra* note 7, at 5.

²¹⁷ *Ibid.* See also, Indra, *supra* note 92, at 3-4. Although the 1951 Refugee Convention definition is gender-neutral, Kelly has argued that, "the law has developed within a male paradigm which reflects the factual circumstances of male applicants, but which does not respond to the particular protection needs of women". Bhabha, Goldberg and Kelly similarly argue that international refugee law has evolved through an examination of male claimants and their activities at the expense of women. As such, "men have been considered the agents of political action and therefore the legitimate beneficiaries of protection for resulting persecution. Greatbatch summarises this criticism: "by portraying as universal that which is in fact a male paradigm, it is argued, women refugees face rejection of their claims because their experiences of persecution go unrecognised". See, Kelly, "Gender-Related Persecution: Assessing the Asylum Claims of Women", *supra* note 92, at 674; Bhabha J, "Legal Problems of Women Refugees" 4 Women: A Cultural Review 240, (1993), at 240-9; Goldberg P & Kelly N, "International Human Rights and Violence Against Women: Recent Developments", 6 Harvard Humanitarian Rights Journal 195, (1993), at 195-209; Crawley, *supra* note 7, at 5; and Greatbatch, *supra* note 91, at 518.

²¹⁸ Crawley, *supra* note 7, at 6.

²¹⁹ *Ibid.* For further academic discussion on this issue please see, Cipriani, *supra* note 157, at Section V and 540. See also, Kelson G, "Gender-based persecution and political asylum: The international debate for equality begins", 6 Texas Journal of Women and the Law 181, (1996).

highlighting the marginalization of women and their experiences within current interpretations of international refugee law, it is also problematic. This quandary stems from its tendency to be grounded in an analysis of ‘sex’ as the key factor accounting for the differential experiences of refugee women rather than the construction of gender identity in particular historical, geographical, political and socio-cultural contexts.²²⁰ Similarly, as alluded to in the introductory chapter, the focus on ‘women’ also, as opposed to gender in refugee research and practice further replicates and reinforces the marginalization of women’s experiences.²²¹ It can lead to a tendency to generalize about the experiences of women as asylum-seekers. This inclination can be problematic for several reasons. First, it leads to confusion about what is meant by the term ‘gender-related persecution’.²²² Secondly it concerns the need to recognise that while there exist differences between the experiences of women and men respectively, there also *exist differences between women* within and between countries and contexts.²²³ This includes race, class, age, marital status etc.²²⁴ The problem with this approach is that it has created a female-model of persecution, which generalizes women’s experiences of persecution,

²²⁰ Crawley, *supra* note 7, at 6-7. There is an inclination for the term ‘gender’ to be used synonymously with the term ‘sex’. ‘Gender’ refers to the, “relationship between women and men based on socially or culturally construed and defined identities, status, roles and responsibilities that are assigned to one sex or another”, whereas ‘sex’ is a biological determination. Thus, gender is not static or intrinsic but acquires culturally and socially constructed meaning because it is a crucial way of signifying power relations. Therefore, according to Crawley, gender relations and gender differences are historically, culturally and geographically specific, so that what it is to be ‘a woman’ or ‘man’ varies as time progresses.

²²¹ According to Crawley, whilst the explicit recognition of ‘women’ as separate entities is a welcome development over not considering ‘gender’ at all, ‘gender’ is not usefully equated simply with women because it can lead to a number of unnecessary conceptual limitations and political dead-locks. *Ibid.*

²²² As Macklin suggests, the concept of women being persecuted as women is not the same as women being persecuted *because* they are women. The concept of women being persecuted *as* women addresses forms of persecution that are gender-specific including, for example, FGM, rape and forced abortion. Thus, understanding the ways in which women are violated as women is vital to naming as persecution those forms of harm which only/mostly affect women. According to Crawley, gender-specific persecution is therefore a term used to explain ‘serious harm’ within the meaning of persecution. Gender-related persecution is used to explain the basis of the refugee claim. Therefore, a woman may be persecuted as a woman (i.e. raped) for non-gender reasons (i.e. because of her political opinion or nationality), not persecuted as a woman but still because of gender (i.e. because of her failure to comply with societal norms, like covering her face), and persecuted as and because she is a woman (i.e. FGM). *See*, Macklin, *supra* note 175 and Crawley, *supra* note 7, at 7-8.

²²³ *Ibid.*

²²⁴ The tendency of academics, policy-makers and decision-makers to treat ‘women’ as a uniform category, in order to emphasize the ways in which the experiences of women generally have been marginalized within the discourse, also means that important differences between women have largely been ignored. This approach hampers the examination of the significance of heterogeneity for the persecution suffered or feared. *See*, Crawley, *supra* note 7, at 8.

focusing on sexual violence and marginalizing other forms of resistance and oppression experienced by women.²²⁵ Thus, the effect of merely adding ‘women’ to the existing discourse, without actually understanding the differences between women, is that women are always classified as victims. Refugee women are presented as uniformly poor, powerless and vulnerable, while western women are the reference point for modern, educated, sexually liberated women.²²⁶ This generalization reinforces existing beliefs that non-western women, are passive victims of ‘male oppression’, ‘restrictive cultures’, and ‘religion or traditions’. Crawley maintains that, women are neither a homogenous group nor are they mere victims of patriarchal domination. She posits that they “are fully fledged social actors, bearing the full set of contradictions implied by their class, racial and ethnic locations as well as their gender”.²²⁷ This sentiment was also recognized in the leading UKHL case of *Shah and Islam* where it was determined that:

Generalizations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact on the particular case.²²⁸

Therefore, by encouraging decision-makers to look at gender as opposed to sex enables an approach which can “accommodate specificity, diversity and heterogeneity”.²²⁹ It also ensures that the claims of women are not dismissed as culturally relative and therefore outside the mechanisms for protection available under the Refugee Convention.

2. Difficulties in Interpreting the Refugee Convention definition

The failure of legal representatives and decision-makers to recognise and respond appropriately to the experiences of women stems not only from the failure to incorporate or recognise gender as a ground for persecution, it also stems from the fact that the Refugee Convention definition is frequently approached with a partial perspective and

²²⁵ *Ibid.*

²²⁶ Parpart VL, “Who is the ‘Other’? A Postmodern Feminist Critique of Women and Development Theory and Practice” 24 Development and Change 439, (1993), at 439- 464.

²²⁷ Crawley, *supra* note 7, at 8.

²²⁸ *Islam v SSHD; R v IAT ex parte Shah* (1999) INLR 144, Imm AR 283 (HL) (Hereafter referred to as *Shah and Islam*).

²²⁹ Crawley, *supra* note 7, at 9.

interpreted through a framework of male experiences. One of the main failings of refugee law, which causes problems for female refugee claimants, is the failure of decision-makers to incorporate the gender-related claims of women into their interpretation of the existing ‘recognised’ grounds. In interpreting the Refugee Convention, decision-makers have largely failed to recognise the inherent political nature of private acts of harm. For instance, because rape is viewed as a sexual act rather than an act of violence, the perpetrator, even when a government official or a member of an anti-government force, is perceived as acting from personal motivation. Consequently, “the personal nature of the harm may serve to personalize the events in the eyes of the adjudicator”.²³⁰ The following subsections (which will be more fully discussed in Chapter Two) will deal primarily with the international stance and the position of the case-studies in respects of these matters will be dealt with within their respective chapters.

A. Well-Founded Fear of Persecution

The phrase ‘well-founded fear of persecution’ is central to the definition of refugee and is said to exist if the claimant can establish, to a reasonable degree, that her continued stay in her country of origin has become intolerable. However, since there is no universally accepted definition of ‘persecution’ courts in different States have defined persecution differently. According to Grahl-Madsen, this failure to establish a common definition was deliberate so as to permit a case-by-case determination of whether any given conduct constitutes a persecutory act.²³¹ Whilst there is no ‘established’ definition, there are certain threats to life and freedom that are always considered persecution, including: genocide, slavery, the unlawful killing of individuals, torture and other forms of cruel or inhuman treatment. Consequently, scholars, judges, practitioners and legislators have typically equated persecution with serious human rights violations. The UNHCR has stated that persecution, as used in refugee law, is generally considered a, “threat to life or freedom....(or any) other serious violations of human rights”.²³² Usually, a governmental

²³⁰ *Ibid*, at 35.

²³¹ Grahl-Madsen A, “*The Status of Refugees in International Law*”, *supra* note 176.

²³² UNHCR Handbook, *supra* note 147, para 51.

agent must issue the threat or cause the violation to qualify the action as persecution. But in some circumstances, actions by the local populace may also constitute grounds for protection.²³³ Consequently, States have been left with a wide margin of appreciation about interpreting the term ‘persecution’, and practice as will be discussed in subsequent chapters is neither coherent nor consistent. This lack of any intrinsic meaning is consequently problematic in terms of the objective assessment of individual women’s claims for refugee status.

B. Physical Abuses of Women as Persecution: Persecution by Non-State Agents

The forms of physical abuse experienced by women, such as rape, coerced prostitution, domestic violence, and harmful cultural practices such as FGM and bride burning, undoubtedly fall within the limits of the ‘definition’ of persecution, using the formulations listed above. Such forms of violence are so fundamental that no circumstance can ever justify their derogation under international law. When the State is actively involved in the commission of such abuse against women, there is little doubt the victim, “endures harm or suffering from a governmental restriction on life, liberty, and fundamental human rights”.²³⁴ Further, the reason for the infliction of harm, namely the victim’s sex, must be recognised by the State as illegitimate. Finally, as discussed throughout this chapter, physical acts of violence against women constitute fundamental human rights violations. According to the UNHCR Handbook, “serious discriminatory or other offensive acts committed by the local populace, or by individuals,” can be considered persecution if they are “knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.”²³⁵ This definition is often problematic for women seeking refugee status, as the persecution which they typically face is perpetrated largely by non-government agents, and thus women must prove that the government in question is unable or unwilling to protect her.²³⁶

²³³ *Ibid*, para 65.

²³⁴ Schenk, *supra* note 175, at 319.

²³⁵ UNHCR Handbook, *supra* note 147, at para 65.

²³⁶ See, McCabe, *supra* note 72, at 441. Specifically, it could be argued that this requirement has proved to be problematic for women seeking refugee status from severe domestic abuse. As Mackin has argued, “domestic violence is a paradigmatic example of gender-specific abuse committed by ‘private actors’. It

C. Establishing the Refugee Convention Ground: The Interpretation of Politically Motivated Sexual Abuse as Random Acts of Violence and the PSG Category

Serious harm, even where there is a sufficient link with the State, must also have a persecution ground if it is to form the basis for a successful refugee claim. Some of the most difficult issues in current jurisprudence arise over whether a gender-related refugee claim involves persecution ‘on account of’ one of the five enumerated grounds which are norms of non-discrimination:

The risk faced by the refugee claimant must have some nexus to her race, religion, nationality, political opinion or membership of a particular social group. The critical question is whether but for her civil or political status she could reasonably be said to be at risk of serious international harm. If the risk that motivates her flight to safety is not casually related to civil or political status, the requirements of the Convention refugee definition are not met.²³⁷

Apart from ‘membership in a PSG’, the enumerated persecution grounds within the Refugee Convention are relatively clear and claims to refugee status by women can often be framed within them. It has been increasingly recognised, however, that in many cases

has long been consigned to the ‘private’ sphere, and thus allegedly beyond the reach of state intervention. It’s invisibility in the arena of international human rights follows almost axiomatically from its characterization as ‘private’ at the local level. And, of course, it is the very inattention and inaction by the state in relation to battering that tacitly condones and sustains it as a systematic practice. In other words, the fact that the state does not adequately protect women from domestic (and sexual) violence is both an institutional manifestation of the degraded social status of women, and a cause of its perpetuation”. Under the laws of most Western States in modern times, if spousal abuse is punishable under a specific law and/or governmental or non-governmental services are available to assist such victims, it may serve as evidence that the government is able and willing to offer protection. Evidence that an effort to seek help from the authorities would be wasted is also relevant, however. The problem is further exacerbated within the US context for example by the assertion in the INS gender-guidelines that although the persecutor may be a State actor, the question still may arise as to whether the harm inflicted or threatened is ‘purely private’. Whilst it is to an extent necessary to distinguish within the context of refugee determination whether the State has a hand in the alleged persecution, either directly or by failing to protect and where a harm is committed by an individual which may be punishable in domestic criminal law, by implementation it appears that the INS is contending that if the harm is deemed purely private then it will render the claimant ineligible for protection. See, Macklin A, “Cross Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims”, 13 Georgetown Immigration Law Journal 25, (1998), at 48-9, 52; McCabe, *supra* note 72, at 442; Saso D, “The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines” 8 Hastings Women’s Law Journal 263, (1997), at 298-300; and *Klawitter v INS*, 970 F.2d 149 (6th Cir. 1992).

²³⁷ Hathaway, “The Law of Refugee Status”, *supra* note 3, at 136.

female refugee claimant's face, "barriers to protect which center around the issue of ground, even though their claims of a well-founded fear of persecution are comparable to those of members of the delineated groups".²³⁸ For example, it is evident from existing determinations, that sexual violence frequently obscures the relationship between persecution and the Refugee Convention definition persecution grounds.²³⁹ Survivors of sexual violence perpetrated in prison camps by officials, by the military etc often find it difficult to establish that their victimization was linked to their religion, race, nationality, political opinion or membership of a PSG, rather than a random expression of individual sexual violence.²⁴⁰ Most women seeking refugee status, consequently usually attempt to establish that they were persecuted on account of their membership in a PSG or on account of their political opinion.

The membership of a PSG category is the most difficult of the enumerated grounds to define and is the subject of many legal arguments at both the international and domestic levels. Different adjudicators and immigration judges also understand it somewhat differently. A PSG is generally understood as an identifiable group of people viewed by government as a threat. It is also often described as a group sharing a common characteristic that is so fundamental to their individual identities that the members cannot or should not be expected to change it. The shared characteristic might be something you were born with (such as gender, color, or family ties), or it may be a shared experience (such as former property ownership, or former gang or military conscription). Broadly speaking, a PSG is composed of persons who have a similar background, social status, lineage, experiences, or habits. In recent years, some States have recognized persecution based on gender as a PSG. This has allowed some women to gain asylum based on having undergone (or fearing that they'll be forced to undergo) cultural practices such as FGM, Islamic dress code requirements, forced marriage, or domestic violence. Nevertheless, despite this, some would argue that States are reluctant to interpret gender as a PSG because they, "realize that human rights violations against women are so widespread, and they fear that to allow asylum based on gender persecution would 'open the floodgates'

²³⁸ Crawley, *supra* note 7, at 62.

²³⁹ *Ibid*

²⁴⁰ *Ibid.*

for women refugees seeking asylum” in western States.²⁴¹ However, this is extremely unlikely. Even if the most liberal policy were adopted with respect to gender-based violence, which in turn recognised women as constituting a PSG, the actual number of women who would be able to avail themselves of such protection is extremely limited. Take for instance the issue of FGM, most victims who undergo FGM are subjected to it at puberty, or even earlier and most probably do not even question the practice which is entrenched within their community and indeed the very fabric of their culture. Certainly, they do not possess the means to leave their community, far less travel to western States to seek refugee status.²⁴² In addition, the floodgates argument is not germane given the humanitarian and human rights underpinnings of refugee law. As such, refugee law should not be concerned nor influenced by considerations about reducing immigration levels. Instead, concerns about ensuring an effective remedy to all persons who fear that their life or freedom is being threaten on account of the grounds enumerated in the Refugee Convention should prevail.²⁴³ Furthermore, as argued by Amnesty International, whether a PSG consists of large numbers is irrelevant as other Convention grounds, such as nationality and political opinion, are also characteristics shared by large numbers of individuals whose human rights are not sacrificed merely because they represent a large group.²⁴⁴

Consequently, given the varying approaches which exist to the interpretation of the PSG category and the protection gaps which can result, the UNHCR advocates that the approaches endorsed by States ought to be reconciled.²⁴⁵ The protected characteristics approach may be understood to identify a set of groups that

²⁴¹ McCabe, *supra* note 72, at 443. See also, Godfrey J, “Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees”, 3 Journal of Law & Policy 257, (1995), at 280-1.

²⁴² Helton A & Nicoll A, “Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of *In re Fauziya Kasinga* and Prospects for more Gender Sensitive Approaches” 28 Columbia Human Rights Law Review 375, (1997), at 387.

²⁴³ *Ibid*, at 387-8.

²⁴⁴ See, Amnesty International, “Female Genital Mutilation: A Human Rights Information Pack” (2004), available online at <http://web.amnesty.org/actforwomen/index-eng> (last accessed 21/11/07).

²⁴⁵ UNHCR, “Guidelines on International Protection: “Membership of a particular social group” within the context Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, HCR/GIP/0202 (2002), Section B. These guidelines are available online via the UNHCR website at <http://www.unhcr.org/uk/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> (last accessed 8/6/17).

constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.²⁴⁶

This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the PSG category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.²⁴⁷ Moreover, it has been proposed by the UNHCR that if a claimant alleges a PSG that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group within that society.²⁴⁸ In furtherance of this definition, the UNHCR has also stated that in addressing the PSG category, a PSG cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted.²⁴⁹ Nor is there a requirement of cohesiveness.²⁵⁰ Thus, mere membership of a PSG will not normally be enough to substantiate a claim to refugee status.²⁵¹ Additionally, it has been stated that not all members of the group must be at risk of persecution,²⁵² nor does the size matter.²⁵³ As previously stated, some jurisdictions have

²⁴⁶ *Ibid*, Para 11.

²⁴⁷ *Ibid*, Para 12.

²⁴⁸ *Ibid*, Para 13.

²⁴⁹ *Ibid*, Para 14.

²⁵⁰ *Ibid*, Para 15. The relevant inquiry is whether there is a common element that group members share. This is similar to the analysis adopted for the other Convention grounds, where there is no requirement that members of a religion or holders of a political opinion associate together or belong to a "cohesive" group. Thus, women may constitute a PSG under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic

²⁵¹ *Ibid*.

²⁵² *Ibid*, Para 17.

²⁵³ *Ibid*, Paras 18-19. The size of the purported PSG is not a relevant criterion in determining whether a PSG

recognized “women” as a PSG. This, does not mean that all women qualify for refugee status. Claimants still have to demonstrate a well-founded fear of being persecuted based on her membership in the PSG, not be within one of the exclusion grounds, and meet other relevant criteria.²⁵⁴ There is no requirement that the persecutor be a State actor.²⁵⁵ In sum the casual link will be satisfied if, firstly where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or secondly, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.²⁵⁶

Claimants who have experienced gender-based persecution have also often claimed persecution on account of a ‘political opinion’. The traditional understanding of persecution for reasons of political opinion implies that the individual concerned holds opinions which are not tolerated by the authorities, for example, opinions which are critical of the government’s policies or methods.²⁵⁷ Further, the person concerned must fear persecution because the authorities have knowledge of such opinions or such opinions are attributed by the authorities to the person concerned. In situations where the person has not expressed his opinions, but it can reasonably be expected that the authorities will, sooner or later, become aware of his opinions, and that as a result the person will come into conflict with the authorities, the person can be considered to have a well-founded fear of persecution for reasons of political opinion.²⁵⁸ A political opinion can also be implicit in conduct. In other words, action which is perceived to be a challenge to a governmental authority is considered to be an expression of a political opinion.²⁵⁹

exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society - perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

²⁵⁴ *Ibid*, Para 19.

²⁵⁵ *Ibid*, Para 20.

²⁵⁶ *Ibid*, Para 23.

²⁵⁷ Luopajarvi, *supra* note 155, at 29.

²⁵⁸ *Ibid*. See also, UNHCR Handbook, *supra* note 147, paras 80, 82.

²⁵⁹ Hathaway, *The Law of Refugee Status*, *supra* note 3, at 152-7.

The image of the typical refugee as a person fleeing persecution for his or her direct involvement in political activities does, however, not always correspond to the reality of the experiences of women in some societies, as already discussed. Women are less likely than men to be involved in high profile political activities and are instead often involved in political activities that reflect dominant gender roles, such as nursing or cooking for rebel soldiers, or preparing and distributing leaflets.²⁶⁰ The problem is that such activities are not always recognised as political. Women are also frequently being targeted, not because of their own opinions but because of the political opinions or activities of their relatives. Because women's imputed or real political activities or opinions often differ from those of men, they tend to be misunderstood.²⁶¹ Unfortunately, courts have consistently characterized rape and other forms of sexual violence against women as mere random acts of violence, not entitled to the remedy of asylum, even when committed by government representatives.²⁶² Although western courts are not hesitant to infer that torture of a male dissident by the government is politically motivated, they are nevertheless reluctant to make the same inferences when the persecution for a political opinion takes the form of rape or sexual abuse of a female dissident by the government.²⁶³ Thus Sontag posits that, "as it works now, immigration law only recognizes rape as persecution for political views if the rapist says, 'I'm raping you because of your political views'".²⁶⁴ Furthermore, it should also be noted that rape, domestic violence and other forms of gender-based violence for the most part are not inflicted specifically because a person holds a certain political opinion, and in the words of Eve McCabe, "it seems both offensive and absurd to require that a person subjected to one of these abuses attempt to

²⁶⁰ Luopajarvi, *supra* note 155, at 30.

²⁶¹ *Ibid.*

²⁶² Schenk, *supra* note 175, at 323.

²⁶³ *Ibid.*

²⁶⁴ Sontag D, "Asking for Asylum in US, Women Tread New Territory", New York Times, September 27th, (1993), at A13. An example of the mischaracterization of sexual crimes which commonly occurs in asylum law was documented by Amnesty International in the following US case. In 1983 Catalina Mejia was raped by a soldier from the El Salvadoran army and accused of being a guerrilla. Her home was then searched and ransacked. Subsequently, she was detained two more times by soldiers. She fled to the US in 1985 and sought protection due to persecution on the grounds of political opinion. Her petition was denied in 1988, with the immigration judge, determining that the act of rape was not persecution as defined under US law, but simply an act of random violence committed against a female by a soldier seeking to fulfil his own self-interest. See, Amnesty International, "Women in the Front Line: Human Rights Violations Against Women", (1991), at 49 as cited in Schenk, *supra* note 175, note 14.

prove that she was abused because of an opinion that she holds”.²⁶⁵ Hence, this is an example of how the inadequacy of international refugee law in relation to the abuses that women face has forced claimants to attempt ‘artificial categorization’ in a bid to get a valid form of persecution deemed a basis for refugee status.²⁶⁶

As discussed throughout this chapter, gender-based violence is problematized and treated in the context of the intersections of gender and multiple inequalities. Effectively responding to gender-based violence requires addressing the multi-dimensional and complex circumstances of identity and oppression surrounding every claimant. The RDP fails in this respect when it comes to women. This is evident from the above categorization of politically motivated sexual abuse as random acts of violence, restrictions on the PSG category, and the general inadequacies inherent within refugee and human rights in respects of the public/private divide and cultural relativism. These failures will be scrutinized further in Chapter Two in respects of the domestic gender-guidelines. In addition to the aforementioned factors affecting refugee determination, the following section will now argue that the location of FGM claimants at the intersection of gender and nationality, class and race, makes procedural justice different than for men, but also different in relation to other groups of women asylum seekers. Arguably, the failure of the RDP to acknowledge this has not only further oppressed women but has allowed the limitations of human rights and refugee law to negatively influence and regulate refugee determinations to the detriment of FGM claimants. This discussion will look at the influence of gender-based violence, feminist intersectionality²⁶⁷ and post-colonial feminism²⁶⁸ on refugee determination. A few preliminary points pertaining to the

²⁶⁵ McCabe, *supra* note 72, at 444.

²⁶⁶ *Ibid.*

²⁶⁷ For a comprehensive discussion of feminist intersectionality *see*, Shields S, “Gender: An Intersectionality Perspective”, 59 Sex Roles – A Journal of Research 301, (2008); Research Institute for the Advancement of Women, “Intersectional Feminist Frameworks – An Emerging Vision”, CRIAW: Ottawa, (2006); Rooney E, “Women’s Equality in Northern Ireland’s Transition: Intersectionality in Theory and Place”, 14 Feminist Legal Studies 353, (2006); Reilly N, “Cosmopolitan Feminism and Human Rights”, 22 Hypatia 180, (2007); Sokoloff N & Dupont I, “Domestic Violence at the Intersections of Race, Class, and Gender Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities”, 11 Violence Against Women 38, (2005) & Crenshaw K, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color”, 43 Stanford Law Review 1241, (1991).

²⁶⁸ For a comprehensive discussion of Post-Colonial Feminism, *see*, Parashar S, “Feminism and Postcolonialism: (En)gendering Encounters”, 19 Postcolonial Studies 371, (2016); Kumar Mishra R, “Postcolonial feminism: Looking into within-beyond-to difference”, 4 International Journal of English and

domestic gender-guidelines of the case-studies will be stated in this section to illustrate some of the arguments made where relevant.

3. Additional Issues: The role and influence of gender and race discrimination in interpreting the Refugee Convention definition

In respects of the application and content of the domestic gender-guidelines, and in light of the aforementioned discussion, it is important, firstly, to note that where individual women are persecuted because of their male relative's activities or political opinions, there is jurisprudential authority for recognising claims grounded in familial affiliation as coming within the ambit of the 'membership in a PSG' category. All the gender-guidelines examined in this thesis endorse this approach.²⁶⁹

Secondly, despite the possibility of defining a PSG by reference to gender, decision-makers within the case-studies have generally demonstrated a preference for using the

Literature 129, (2013); Gandhi L, *"Postcolonial Theory: A critical introduction"*, OUP: New Delhi, (2005) & Mohanty CT, Ann R, Lourdes T, *"Third World Women and the Politics of Feminism"*, Indiana University Press: Bloomington, (1991).

²⁶⁹ See, *Asylum Gender Guidelines*, Immigration Appellate Authority, UK, Nov. 2000, Section 3.44 (hereafter referred to as the UK Gender guidelines). See also, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, Home Office, 2010, at 11 (hereafter referred to as the Home Office Asylum Policy Instruction: *Gender Issues in the Asylum Claim*). Available online via the Gov.UK website at <https://www.gov.uk/government/publications/gender-issue-in-the-asylum-claim-process> (last accessed 8/6/17). This instruction similarly noted that there are cases where women are persecuted solely because of their family or kinship relationships, for example, a woman may be persecuted as a means of demoralising or punishing members of her family or community, or in order to pressurise her into revealing information. In respects of the US and Canada, see, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995, Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service, USA, at 15-16 (hereafter INS Gender Guidelines); *Women Refugee Claimants Fearing Gender-Related Persecution - Guidelines* issued by the Chairperson pursuant to section 65(3) of the Immigration Act, Immigration and Refugee Board, Ottawa, Canada, 9 Mar. 1993, Section A.3. These Guidelines are available online via the Immigration and Refugee Board of Canada Homepage at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx> (last accessed 8/3/17). Hereafter referred to as the CIRB Gender Guidelines. In relation to the UK Gender Guidelines, it is also important to note that they also address the same scenario as persecution on account of imputed political opinion. This is based on the assumption that persecutors impute to women the political opinions of their family members, including both her own family and that which she has married into. UK Gender Guidelines, *supra* note 269, Section 3.32-33 & Home Office Asylum Policy Instruction: *Gender Issues in the Asylum Claim*, *supra* note 269, at 12 (Furthermore a person may be attributed a political opinion that they do not actually hold – women may be attributed the same political views as their male relatives. In these circumstances, it is essential to look at what motivates the persecutor as they will be attributing the political opinion to the individual. For instance, a woman who is forced to provide food for a rebel group may be attributed a political opinion by the State even though she does not support the group).

enumerated grounds wherever possible.²⁷⁰ This is not always appropriate to do so. The following US case illustrates some of the problematic messages conveyed by the reasoning employed by an immigration judge who accepted a female asylum-seeker fleeing domestic violence.²⁷¹ In *Matter of A and Z*, the claimant was a Jordanian woman who had married an influential businessman with connections to the Jordanian Royal family.²⁷² She was physically abused throughout their marriage, and as a result of his connections he was shielded from prosecution.²⁷³ In accepting her claim, the court reasoned that the claimant had been persecuted on account of her perceived acceptance of Western values as expressed through her desire to be educated and her resistance of the abuse inflicted upon her.²⁷⁴ The court reasoned that she was targeted because, “she seeks to have her own identity, who believes in the ‘dangerous’ Western values of integrity and worth of the individual”.²⁷⁵ The purpose of the abuse she endured was to, “achieve her submission into the society’s mores”.²⁷⁶

Macklin has argued that it is inquisitive and, “not a little ethnocentric to presume that a belief that one should not be beaten is a distinctively western value”.²⁷⁷ Arguably, on the one hand, it patronizes and essentializes Jordanian society. On the other, if a belief that their partners should not abuse a woman really was a ‘western value’, one would expect domestic violence to be rare (or non-existent) in the West. Like the rest of the world, Western refugee-receiving States, including my chosen case-study countries are plagued by the pervasive and pernicious phenomenon of domestic violence. Indeed, the immigration judge describes an occurrence where the applicant and her husband were living in the US, and the applicant’s husband was, “terrorizing his wife and sons”.²⁷⁸ The police were called, and her husband attempted to have his family removed from their

²⁷⁰ Macklin, *supra* note 236, at 57.

²⁷¹ *In the Matter of A and Z*, Nos. A 72-190-893, A 72-793-219 (Executive Office for Immigration Review, Office of the Immigration Judge, Dec. 20, 1994).

²⁷² *Ibid.*, at 2.

²⁷³ *Ibid.*, at 3-6.

²⁷⁴ *Ibid.*, at 16-17. “The respondent has continued to express her belief in Western values through her actions. The respondent has been punished because her actions collide with the societal and religious norms in Jordan. The respondent’s actions have challenged the system....The respondent, by challenging her husband’s power to beat her, has challenged the system of submission by women in Jordan”. *Ibid.*, at 16.

²⁷⁵ *Ibid.*, at 14.

²⁷⁶ *Ibid.*, at 15.

²⁷⁷ See, Macklin, *supra* note 236, at 58.

²⁷⁸ *In the Matter of A and Z*, *supra* note 271, at 8.

home.²⁷⁹ Upon their arrival, the police tried to calm the situation and were offered a bottle of vodka by her husband and they left.²⁸⁰ The abuse continued. This episode does not speak favourably of western attitude towards domestic violence.

Moreover, upon examination of the immigration judge's analysis, it has been argued that it is bizarre to characterise a man's reasons for abusing his wife as 'her' real or imputed political opinion about her role and status within society.²⁸¹ In fact, such a characterization, begets potentially, "invidious and artificial distinctions regarding men's motivation for beating their intimate partners".²⁸² For instance, in his decision, the judge remarked that if a man abuses his partner because he believed she was unfaithful, "her claim would not, by itself, qualify as a ground for granting asylum".²⁸³ Many abusive men are jealous and accuse their partners of being unfaithful. Surely, "the issue is not the proximate reason for the violence, but the underlying assumption that men are entitled to beat women".²⁸⁴ Thus, the judge's analysis appears predicated on the idea that there are both 'political' and 'personal' reasons for abusing women. Merely to state this proposition is to reveal its anti-feminist implications. This analysis further reinforces the misconception underlying such decisions that such violence is a private issue, unconnected to the social and political structures which serve to perpetuate the subjugation of women, and secondly, that decision-makers, are reluctant to grant refugee status in cases where the alleged gender-related violence appears similar to forms of gender-related violence that are pervasive within their own borders. Whilst this argument may appear to suggest that if followed through to its logical conclusion that all women who are abused are entitled to refugee protection, this is not my intended argument. All cases should be reviewed independently, and claimants need to meet the eligibility criteria for refugee status as outlined in Article 1A of the Refugee Convention.

On a more positive (if unrealistic) note, it has been proposed that the main evidence presented of the Jordanian women's adherence to 'Western' values was her objection to

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Macklin, *supra* note 236, at 58.

²⁸² *Ibid.*

²⁸³ *In the Matter of A and Z*, *supra* note 271, at 18.

²⁸⁴ Macklin, *supra* note 236, at 58.

being abused.²⁸⁵ If acting on the urge to protect oneself is all that is required to manifest a political opinion regarding women's role in society, then it can only be hoped (and it is only a hope) that every woman who flees domestic violence should be able to establish a nexus to a political opinion by virtue of having fled.²⁸⁶ As was implied in *Lazo-Majano*, it is the man's political opinion regarding the role, status and value of women that explains why he abuses women.²⁸⁷ Thus, I would argue that men abuse women because of their political opinions concerning the role they believe women to have, not because of what women believe. Indeed, to suggest that men abuse women because of what women believe on the basis of their actions, might support an inference that the abuse would stop if women would 'behave' and 'change their attitude', a proposition which is both offensive and dangerous to women. Domestic violence is not about what a woman believes, but about her gender identity and the 'sexist' beliefs of the individual who abuses her. As such, it cannot be explained or categorised as political opinion because, political opinion refers to the victim's beliefs, and not those of her persecutor.

Thirdly, most Western decision-makers would concede that domestic violence is linked to gender. Since gender is not an enumerated persecution ground, this has led to consideration of 'women' or 'women subject to domestic violence', as a PSG in all three jurisdictions under examination. Whilst the CIRB gender-guidelines cite gender as an example of such a characteristic, they contain no further practical guidance on whether or how to circumscribe a gender-based social group. In *Acosta*, the BIA remarked that sex could be a type of shared characteristic relevant to constituting a PSG. Like Canada, however, this remark has not resulted in further specification and, as the INS gender-guidelines note, various US courts have proffered different opinions on whether and how gender may form the basis of social group ascription.²⁸⁸ The UK gender-guidelines are also guilty of this omission.

Finally, none of the gender-guidelines under consideration in this thesis examine the PSG category within the specific context of domestic violence. This is regrettable as domestic violence is epidemic and is possibly one of the most common and challenging

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ See *Lazo-Majano v INS*, 813 F.2d 1432 (9th Cir. 1987).

²⁸⁸ INS Gender Guidelines, *supra* note 269, at 13-15.

contexts where decision-makers must articulate a PSG.²⁸⁹ Whilst all three jurisdictions, as will be discussed in Chapter Four, have taken great strides to overcome the epidemic of domestic violence within their own borders, their willingness to protect their ‘own female citizens’ has not been incorporated into the national gender-guidelines. The fact that domestic violence is not mentioned within the context of the PSG category firstly reinforces the belief of this researcher that Western States do not want to be categorised within the same grouping as ‘other’ States where human rights abuses are pandemic. In other words, they do not want to admit that human rights abuses occur within their borders. Secondly, this omission affords decision-makers a wide discretion in formulating a PSG based on domestic violence. Finally, in tandem with the aforementioned view, such a deliberate oversight not only affords decision-makers discretion in formulating such groups, it also allows states to control the number of female refugees entering their borders,²⁹⁰ thus limiting such claimants access to refugee determination.

The lack of treatment of domestic violence in the guidelines, coupled with the failure to provide practical guidance on whether or how to circumscribe a gender-based social group is worrying. Such omissions whether deliberate or not, can impact significantly on the claims of female claimants, with the result that they may be unfairly denied protection. The omission of gender from the Refugee Convention has resulted in inequalities in the evaluation and determination of refugee claims, inequalities the CIRB, INS and UK gender-guidelines were designed to correct. Whilst the inclusion of gender as an additional enumerated persecution ground is a potential remedy and would arguably better address the gender-bias and subsequent marginalization of women’s experiences within the international refugee arena, it should be noted that since the current statutory language of refugee law does not necessarily preclude these claims,²⁹¹ amendment is unlikely. The problem for women fleeing FGM, therefore, is not solely the statutory language of refugee law *per se*, but as is evident from this chapter, firstly how it is interpreted and secondly,

²⁸⁹ Macklin, *supra* note 236, at 60.

²⁹⁰ For further information on some of these issues, see Macklin, *supra* note 236, at 59-67 (discussing the formulation of PSGs based on domestic violence. Explicit reference is made to the US, Canadian and Australian positions).

²⁹¹ Linarelli J, “Violence Against Women and the Asylum Process”, 60 Albany Law Review 977, (1997), at 979 (asserting that plain reading of asylum law illustrates that recognising gender-based persecution does not expand scope of the statute); Macklin, *supra* note 236, at 28 (arguing that ‘it requires a special effort of will not to apply existing principles to the situation of women’).

the ostensibly gender neutral discretionary process, in which refugee status determinations takes place.

But why would decision-makers interpret the law to turn away women whom they acknowledge have faced persecution in their home countries? More systemic than possible prejudice harbored by individual decision-makers, a more comprehensive answer (as will be discussed in the next section) lies within what Anita Sinha describes as being the, “legacy of gender and race discrimination in both immigration and asylum law”.²⁹²

A. Race, Culture and Gender

Hathaway and Foster have argued that there is merit in the argument that if refugee law is to be understood as part of a wider body of human rights law, it is essential that given the importance of understanding the claimant’s particular circumstances, it is critical that decision-makers approach refugee determination assessments with an open mind.²⁹³ Similarly, Professor Colin Harvey has stated that the objective nature of refugee determination, “internationalises asylum decision-making and requires decision-makers to be openminded in their assessments”.²⁹⁴ Arguably, unless decision-makers come to the process with an open and unbiased mindset, it will remain inherently prejudiced and futile. The gender bias and marginalization of women’s experiences within the refugee context is an immensely complex issue. The application of refugee law and the 1951 refugee definition itself remains constrained firstly by its founding interest to protect educated male elite claimants and, secondly, the influence of cultural relativism, which ultimately misconstrues FGM and other gender-based forms of violence against women as private issues, unrelated to the larger political and social structure which serve to maintain their subordinate status.²⁹⁵ Race and racism may also play a significant role in how refugee claims are heard and decided, and as decision-makers are not accountable for failing to

²⁹² Sinha A, “*Domestic Violence and US Asylum Law: Eliminating the ‘Cultural Hook’ for Claims Involving Gender-Related Persecution*”, 76 New York University Law Review 1562, (2001) at 1574.

²⁹³ Hathaway J & Foster M, “*The Law of Refugee Status*”, (2nd ED), Cambridge University Press: Cambridge, (2014), at 319.

²⁹⁴ Harvey C, “*Seeking Asylum in the UK: Problems and Prospects*”, Butterworths: London, (2000), at 237.

²⁹⁵ Sinha, *supra* note 292, at 1574-8.

implement the guidelines, this convergence of racial and gender stereotypes, playing out in the language of 'culture', creates a serious obstacle for gender-based refugee claims. Coupled with the prejudices of individual decision-makers, the likelihood of women fleeing FGM being denied refugee protection remains considerable.

Exploring narratives of culturally defined deviance, Leti Volpp states, "the terrain on which we articulate and understand racialized difference is frequently that of gendered treatment".²⁹⁶ Volpp's insight that conversations about women and gender often are actually conversations of racial difference is illuminating in the immigration and asylum context.²⁹⁷ In an arena in which racism historically has informed policy²⁹⁸, early immigration laws provide stark examples of how racial discrimination affected the treatment of gender. In the early twentieth century, for example, US citizenship laws contained an anti-miscegenation provision directed specifically at women.²⁹⁹ A century after these laws were rescinded, the gendered treatment of racialized difference continues to impact the treatment of immigrant women. For example, the welfare "reform" movement in the 1990s in the US had a disproportionately negative impact on immigrant women. As this initiative was renowned for the gendered rhetoric of the "welfare queen"³⁰⁰ and racialized images of the undeserving³⁰¹, Sinha posits that it is hardly

²⁹⁶ Volpp L, "Blaming Culture for Bad Behaviour", 12 Yale Journal of Law and the Humanities 98, (2000), at 90.

²⁹⁷ This interplay of sexism and racism was the basis of a movement by women of colour in the US during the late 1970s and early 1980s criticizing mainstream feminism as "white female racism." Hooks B, "Feminism is for Everyone: Passionate Politics", South End Press: Cambridge, (2000), at 57. These feminists of colour demanded that white feminists acknowledge the reality of race and racism in the struggle for American women's liberation. Cultural critic bell hooks, while acknowledging that "[o]verall feminist thinking and feminist theory [in the U.S.] has benefited from all critical interventions on the issue of race," *ibid*, at 58-59, nonetheless views this progress as only a "foundation for the building of a mass-based anti-racist feminist movement." *Ibid*, at 60.

²⁹⁸ A classic example of overt racism in U.S. immigration law is the treatment of Chinese immigrants at the turn of the nineteenth century. See, *Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (holding that Congress's plenary power permits requirement that white witness attest to Chinese aliens' residence); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (upholding constitutionality of law suspending all future immigration of Chinese labourers because "power of exclusion" is "an incident of sovereignty"). Chinese immigrants were by no means the only target of racist immigration laws. See, *United States v. Thind*, 261 U.S. 204, 213-15 (1923) (finding that immigrant from India was not "white" and therefore ineligible for naturalization).

²⁹⁹ Sinha, *supra* note 292, at 1579.

³⁰⁰ *Ibid*. See also, Dickerson M, "America's Uneasy Relationship With the Working Poor", 51 Hastings Law Journal 17 (1999); Roberts S, "Food Stamps Program: How It Grew and How Reagan Wants to Cut It Back", N.Y. Times, Apr. 4, 1981, §1, at 11 (discussing "legend of the so-called 'welfare queen'").

³⁰¹ White L, "On the "Consensus" to End Welfare: Where Are the women's Voices?", 26 Connecticut Law Review 843, (1994), at 854 (noting that, after World War II, -[t]he counterfactual racist stereotypes of the

surprising that, “the political debate over the reduction of public assistance to immigrants generally failed to weigh the disproportionate impact of such measures on immigrant women”.³⁰²

The discursive treatment of asylum claims involving violence against women of colour is reminiscent of the way in which race and gender discrimination have played out in immigration law generally.³⁰³ Cultural stereotypes of non-Western societies have informed the way in which these claims of gender-related violence in non-Western countries are perceived and discussed. Sinha notes that these conversations perpetuate problematic notions attributable to colonialist feminism³⁰⁴ which is predicated upon exoticizing notions of “the Other”³⁰⁵ and “alien” culture.³⁰⁶ By fighting sexism with racism, colonialist feminism and advocates of intersectionality defined its mission as saving their Third World sisters from their uncivilized cultures.³⁰⁷

Although colonialist feminism adheres to a perspective that is over a century old, its roots continue to underlie the way that violence against women abroad is characterized. Present-day media depictions of gender-related violence abroad are one example of this legacy. In one article, an author enumerates examples of violence against women outside the US as including genital mutilation in Africa, bride burning in India, honour killing in the Middle East, rape as a weapon of ethnic genocide in Bosnia-and admits that, “in

... 'welfare queen' ... began to take hold among the white, middle class public, including women"); Kaufman E, “*The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*”, 23 New York University Review of Law and Social Change 301, (1997), at 301 (“The stereotype of the lazy, black welfare mother... informs and justifies the ongoing welfare debate.”).

³⁰² Sinha, *supra* note 292, at 1579; Johnson K, “*Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*”, 42 UCLA Law Review 1509, (1995), at 1551. Although the racialized rhetoric of the welfare “reform” movement predominantly targeted African American women, the subsequent effect it had on immigrant women illustrates the impact that gendered treatment of racialized difference continues to have on this latter group. Sinha, *supra* note 292, at 1279, note 80.

³⁰³ Sinha, *supra* note 292, at 1579.

³⁰⁴ *Ibid*, at 1579-80.

³⁰⁵ Burton A, “*Burdens of History: British Feminists, Indian Women, and Imperial Culture, 1865-1915*”, The University of North Carolina Press: London, (1994), at 17 (examining process whereby British feminists “created a colonized female Other on whose passivity and disenfranchisement their claims for imperial representation largely relied”).

³⁰⁶ Immigration law scholar Kevin Johnson highlights how the term “alien” both symbolizes and influences how the immigrant community is thought about in the US. “The concept of the alien,” he argues, “helps to reinforce and strengthen nativist sentiment toward members of new immigrant groups, which in turn influences U.S. responses to immigration and human rights issues.” Johnson K, “*Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*”, 28 University of Miami Inter-American Law Review 263, (1997), at 265.

³⁰⁷ Sinha, *supra* note 292, at 1580.

certain hands, these experiences are the topics of tabloid television”.³⁰⁸ Another article began with the story of a Muslim woman from West Africa who was seeking asylum in the U.S. because she would be forced to marry an abusive polygamist upon returning to her home country.³⁰⁹ In what appears to be an attempt at compassionate commentary, the author stated, “Aminah's story is incredible, difficult for a westerner to fully comprehend”.³¹⁰ According to Sinha:

One does not have to look hard to find remnants of the colonialist paradigm running through these accounts—men steeped in a backwards culture subjugating helpless women in ways that cannot even be grasped by the Western imagination. Such depictions are drawn from racialized concepts of the non-Western (couched as “culture”). They also rely on the idea of a primitive collective pathology (manifesting itself in unimaginable stories of violence against women at the hands of barbaric men).³¹¹

Refugee claims that relate to stories of gender-based persecution, including FGM have suffered similar treatment. As such, it is this ‘difficulty to grasp’ which this thesis by analogizing FGM with the domestic treatment of domestic violence aims to redress within the domestic refugee determination systems. Chapter Three will among other issues, highlight the extent to which the convergence of racial and gender stereotypes in the law affects the way decision-makers have handled FGM asylum claims.

The regulation of non-citizens, including asylum-seekers, remains one of the few areas in which governments, invoking State sovereignty, purport to wield near-absolute discretion. Measures adopted by the case-studies to restrict the flow of asylum-seekers, including the use of expedited/fast-track procedures have eroded the statutory institutional and procedural safeguards that, “surround decision-making in asylum law, and mark a reassertion of this broad discretion”.³¹² Due process is a right enshrined in law which

³⁰⁸ *Ibid* (quoting Gross J, “Uniting World Against Violence to Women”, N.Y. Times, May 31, 2000, at B2).

³⁰⁹ Hull J, “Battered, Raped and Veiled: The New Sanctuary Seekers”, L.A. Times Mag., Nov. 20, 1994, at 26, 26-28.

³¹⁰ *Ibid*. See also, Sinha, *supra* note 292, at 1580-1.

³¹¹ *Ibid*, at 1581.

³¹² Heckman, *supra* note 41, at 251-2.

extends to all individuals.³¹³ To be fair, the RDP must be free from bias, prejudice and political influence. However, it is impossible to guarantee due process in the current ‘refugee lottery’ system when refugee decision-makers’ rates of denial are inconsistent.³¹⁴ To secure women’s right to due process under the law, there must be a more uniform approach to decision-maker’s substantive interpretation of the gender-guidelines and the development of an exclusive gender-sensitive process for hearing such claims.

Only by understanding how women’s overlapping identities, including race, gender, ethnicity, religion etc, can those within the RDP, understand the impact these aspects have on a claimant’s experience of oppression and discrimination. Thus, attention to women’s intersectionality provides increased visibility to diversity among women, facilitating a more in-depth understanding of their experiences and the creation of more effective prevention and response efforts. This understanding is important not just in interpreting

³¹³ International instruments contain five different kinds of provisions bearing on the scope and content of institutional and procedural safeguards surrounding asylum law decision-making: (1) provisions that expressly address the right to seek asylum and refugee status; (2) provisions that expressly stipulate minimum procedural safeguards applicable to the removal of aliens from the territory of a State party; (3) general guarantees of the right of individuals to a fair hearing before an independent and impartial tribunal; (4) provisions prohibiting discriminatory treatment; and (5) substantial provisions prohibiting specific State conduct (for example, exposing individuals to a real risk of torture or unreasonably interfering in an individual’s family life) which, combined with rights to an effective remedy, imply certain procedural safeguards. The right to claim refugee status and to seek asylum is provided for under the 1951 Refugee Convention; Art 12(1) UDHR (‘everyone has the right to seek and to enjoy in other countries asylum from persecution’). Minimum safeguards for the expulsion of aliens is provided for under Art 13 ICCPR (‘An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority’). Several international instruments guarantee a fair hearing before an independent tribunal. These include, Art 14 ICCPR; Art 6 ECHR; Art XVIII American Declaration; Art 10 UDHR; and Art 8 American Convention. Most international human rights treaties contain equality provisions requiring States to guarantee to individual’s equality before the law and equal protection of the law without discrimination. *See for example* Art 26 ICCPR; Art 14(1) ICCPR. Most treaties also guarantee substantive rights, such as the right to life, to security of the person, and to freedom from torture or cruel, inhuman or degrading treatment. For a substantive analysis on international provisions bearing on the scope and content of institutional and procedural safeguards surrounding asylum law decision-making, *see* Heckman, *supra* note 41, at 220-30.

³¹⁴ Thompson N, “*Due Process Problems Caused by Large Disparities in Grants of Asylum: Will New Department of Justice Recommendations Solve the Problem?*”, 22 *Emory International Law Review* 385, (2008) (discussing disparities in grants of asylum); Crawley, *supra* note 7, at 1 (noting that statistics regarding the proportion of asylum seekers who are female are often inaccurate, misleading, or unavailable); Love C, “*Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in US Asylum Law*”, 40 *Columbia Human Rights Law Review* 173, (2009) (discussing the disparate treatment of FGM and involuntary sterilization cases).

the Refugee Convention definition, but also in how refugee determination is conducted, as will now be briefly addressed.

III. Procedural and Evidential Issues

Procedures for refugee determination in many western States, as will be discussed more fully in Chapter Two have undergone extensive change in recent years. They have also been the subject of considerable criticism by those concerned that both the information gathering process and the assessment of evidential issues fails adequately to consider the difficulties experienced by women in putting forward information relevant to their claims.

When a claimant presents her case, she must convince the decision-maker that she has either suffered persecution or that she has a well-founded fear of suffering persecution in the future. Documentary evidence of gender-based forms of violence is often difficult to produce.³¹⁵ Official documentary evidence may not even exist if the government has participated in the persecution or attempted to conceal it.³¹⁶ Alternatively, the persecution of women may be deemed a cultural norm and not subject to state action. Under any of these circumstances the claimant, “is forced to rely only upon her own testimony, which often proves insufficient”.³¹⁷

Female claimants who have been subjected to horrific forms of sexual violence may also be reluctant (as already discussed) to speak about their experiences, especially to a male interviewer.³¹⁸ This reluctance is exacerbated by the cultural stigma and embarrassment attached to sexual crimes in many States where women are rejected for

³¹⁵ Martin S, “*Refugee Women*”, Zed Books: London, (1992), at 19. The lack of documentary evidence is sometimes the result of a conspiracy in which the government participates to protect the persecutors from punishment in their home countries and sometimes the result of the victim’s fear of testifying as to her experience.

“Prosecuting those who attack or exploit women has proved to be difficult in many situations. The women are often reluctant to talk about the attacks and go through the emotional and sometimes threatening process of identifying and testifying against the culprits. The perpetrators may be individuals in positions of authority, and those representing the interests of women are unable or unwilling to bring them to account”.

Ibid.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.* See also, Schenk, *supra* note 175, at 321.

³¹⁸ *Ibid.* See also, Martin, *supra* note 315, at 26 (arguing for specially trained female officials in the asylum screening process to assist female applicants who have suffered sexual abuses).

‘failure’ to protect their dignity³¹⁹ Consequently, female victims of violence, discrimination and abuse often do not volunteer information about their experiences and may be reluctant to do so in the presence of family members,³²⁰ especially male family members and children. Discussing experiences of sexual violence in front of family members may become a further source of isolation. A distrust of authorities, created by the claimant’s experience of persecution in her country of origin, may also prevent openness within the RDP. Coupled with language barriers and an unfamiliarity with the laws and customs of the host state,³²¹ female applicants can be perceived as being unpersuasive³²² and therefore deemed to lack credibility.

Many of the same problems are encountered, and possibly exacerbated, when a claimant is testifying to her well-founded fear of persecution.³²³ To satisfy the objective test of a well-founded fear of persecution, there must be, “a showing, by credible, direct, and specific evidence in the record, of facts that would support a reasonable fear of persecution”.³²⁴ Documentary evidence of persecution generally occurring throughout the claimant’s home country may be more easily accessible than evidence of a specific act of persecution against the claimant. But if such evidence is unavailable the claimant’s testimony alone is the basis of any determination.³²⁵ Again, as discussed above problems arise regarding a claimant’s willingness to speak openly, fear of speaking to authorities, and ability to effectively operate within the RDP.³²⁶

Refugee law in its present form is not adequate to address the wide range of human rights violations committed primarily against women. The failure to enumerate gender as a persecution grounds, coupled with cultural relativism arguments has resulted in institutionalized discrimination.³²⁷ This system “allows human rights violations against

³¹⁹ *Ibid.* See also, Schenk, *supra* note 175, at 321.

³²⁰ Crawley, *supra* note 7, at 204.

³²¹ *Ibid.* See also, *Wong Yang Sung v McGrath*, 339 U.S. 46 (1950).

³²² Schenk, *supra* note 175, at 322.

³²³ *Ibid.*

³²⁴ *Ibid.* See also, *Diaz-Escobar v INS*, 782 F.2d 1488, 1492, (9th Cir. 1986).

³²⁵ Schenk, *supra* note 175, at 322.

³²⁶ *Ibid.* See also, *Estrada-Posadas v INS*, 924 F.2d 916, 918-9, (9th Cir 1991) (claimant’s testimony alone can suffice to establish a well-founded fear of persecution, but only if it is ‘credible, persuasive, and specific’).

³²⁷ Weisblat C, “Gender-Based Persecution: Does United States Law Provide Women Refugees with a Fair Chance?” 7 *Tulane Journal of International and Comparative Law* 407, (1999), at 428.

women around the world to continue to flourish, with tacit acceptance by governments”.³²⁸ Accordingly, as stated in the Introduction to this thesis, refugee law and its processes must be reformed in order to accomplish its purpose, which is to provide surrogate international protection where there is a fundamental breakdown in state protection resulting in serious human rights violations. Refugee law should therefore, “serve to internationalize human rights norms by providing international protection when a country does not adequately protect the human rights of its citizens”.³²⁹ In this sense, refugee law serves as a short-term ‘pressure valve’ while human rights issues within the country of origin are remedied.

Conclusion

Unquestionably, a revolution has taken place in the last decade. Women’s rights have been projected onto the human rights agenda with a speed and determination that has rarely been matched in international law.³³⁰ Nevertheless, considerable challenges remain and a protection gap between what is theoretically guaranteed for women and what women experience exists, within both the international human rights and refugee law paradigms. Reform is needed at the international level to bring the experiences of FGM claimants specifically and in tandem the rights of women generally into line with the fundamental human rights that they were guaranteed.³³¹ To fulfil its purpose, refugee law must recognise gender-based violence in the same manner as it recognises persecution on account of race, religion, membership of a PSG, nationality and political opinion. In other

³²⁸ McCabe, *supra* note 72, at 446.

³²⁹ *Ibid.*

³³⁰ Coomaraswamy R, “*Reinventing International Law: Women’s Rights as Human Rights in the International Community*” (Harvard Law School Human Rights Programme (1997), at 7, as cited in McCabe, *supra* note 72, at 459.

³³¹ Such reforms which are not the focus of this thesis could include the following institutional and procedural reforms: (1) the public/private distinction should be dismantled, and international human rights law must uniformly and adequately cover discrimination and violence against women in the areas where there are most vulnerable; (2) governments should be required to take additional actions to address women’s human rights abuses, beyond the requirement that they add or reform laws relating to women; (3) an enforcement mechanism could be put in place to better ensure compliance with international treaties such as CEDAW, and (4) mechanisms put into place to increase the number of women in decision-making positions of power would potentially move issues that primarily affect women into the mainstream international legal order. *See*, McCabe, *supra* note 72, at 459-60. *See also*, Charlesworth, *Feminist Approaches to International Law*, *supra* note 47 at 624-5.

words, refugee law needs to acknowledge the theoretical guarantees underpinning human rights instruments pertaining to women and put them into practice. This branch of law, whilst influenced by the human rights regime, needs to stand on its own two feet and actively protect woman.³³²

Despite existing flaws within both paradigms, a sea-change is slowly occurring and there is a new awareness and willingness to take gender into account in policy development and implementation. There have been some encouraging developments legitimising the factual basis for women's asylum claims, particularly those with a gender-persecution element, not just at the international but also at the domestic level. Chapter Two, will now examine how the case-studies have attempted to remedy the inadequacies inherent within refugee law and the extent to which these reforms are procedurally and to a lesser extent substantively inadequate. It is only by identifying these limitations, that appropriate reforms to redress this insufficiency can be effectively proposed and implemented.

³³² According to McCabe, "requiring countries to accept refugees under this standard could serve as an international pressure valve, temporally protecting persons experiencing serious human rights abuses until the human rights situation in the home country is abated". Such an approach would also potentially cause host countries to put pressure on the countries from which women flee to end human rights abuses. *See*, McCabe, *supra* note 72, at 460.

Chapter Two

National and International Initiatives: Advancing the Protection Needs of Refugee Women?

Introduction

Although the Refugee Convention does not include an explicit reference to sex and/or gender, the importance of gender in shaping the experiences of refugees is increasingly recognized.¹ Guidelines on the Protection of Refugee Women were first issued by the UNHCR in 1991 and were followed in 1995 by guidelines specifically on responding to cases involving sexual violence. In 2002, UNHCR updated its guidelines to include explicit reference to the ways in which gender should be considered when deciding whether an individual is in need of international protection. These guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field. In 2008, the UNHCR also produced a Handbook for the Protection of Women and Girls. This Handbook describes some of the protection challenges faced by women and girls of concern to UNHCR. It sets out the legal standards and principles that guide UNHCR's work to protect women and girls and outlines the different roles and responsibilities of States and other actors. UNHCR has also issued guidelines on membership of a PSG the application of the Refugee Convention in cases involving those who have been, or are at risk of FGM and other forms of gender-based persecution. In response as discussed in the previous chapter, several countries including Canada, the US and UK have now included explicit reference to gender or sex as grounds for refugee status in their domestic refugee legislation, or have recognized that particular forms of gender-related violence or harm constitute forms of persecution.² In

¹ Crawley H, *"Refugees and Gender: Law and Process"* Jordan Publishing Limited: Bristol, (2001), at 12.

² Other notable countries to have followed this trend include Ireland, Germany, Australia, the Netherlands, Sweden and South Africa. See, Macklin A, *"Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims"* 13 Georgetown Immigration Law Journal 25, (1999), at 26 discussing how the introduction of gender guidelines provide

1993 the Canadian government published the first national gender guidelines entitled *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*.³ The Canadian gender guidelines were subsequently updated in 1996 and have formed the template for many of the guidelines subsequently published in other countries.⁴ In 1995, the Immigration and Naturalization Service (INS), predecessor of the US Citizenship and Immigration Services (USCIS), issued *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*,⁵ instructing Asylum Officers on issues to consider when

guidance to decision makers on how to interpret the 1951 United Nations Refugee Definition and adjudicate asylum claims in a gender-sensitive manner.

³ *Women Refugee Claimants Fearing Gender-Related Persecution - Guidelines* issued by the Chairperson pursuant to section 65(3) of the Immigration Act, Immigration and Refugee Board, Ottawa, Canada, 9 Mar. 1993. The Guidelines are available online via the Immigration and Refugee Board of Canada Homepage at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx> (last accessed 8/3/17). Since that time, the Canadian Immigration and Refugee Board (IRB) has issued an updated *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (November 13, 1996) as well as a *Compendium of Decisions: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update* (February 2003). The guidelines provide that women may belong to a “gender-defined social group” where they “fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin”. These updated guidelines are available online via the Centre for Gender and Refugee Studies, at <https://cgrs.uchastings.edu/search-materials/gender-asylum-guidelines> (last accessed 1/3/16). For the purposes of this chapter, I will refer to the guidelines as the CIRB Gender guidelines, focusing on the provisions of the updated versions since 1993. Reference should also be made here to the fact that the IRB also released guidance specific to child asylum applicants: *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (September 30, 1996). Finally, the IRB released the *Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB* (December 15, 2006), which proposes best practices and procedural accommodations for particularly vulnerable asylum claimants appearing before the Board, including children, women with gender-based persecution claims, and survivors of torture. Section 14 of the *Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB* provides that, “The RPD will consider the IRB *Guideline on Women Refugee Claimants Fearing Gender-Related Persecution* in all cases involving refugee cases based on gender”.

⁴ Including the US, Australia and more recently Sweden, the Netherlands and South Africa. In describing this process of influence, Macklin states that, by “demonstrating what could be achieved – politically and legally- in one jurisdiction, made it politically feasible for others to follow suit”. See, Macklin, *supra* note 2, at 68. In other words, Canada validated the normative enterprise of the UNHCR, and through practical exemplarity persuaded other States to develop their own interpretative guidelines. See, Erdman J & Sanche A, “Talking about Women: The Iterative and Dialogic Process of Creating Guidelines for Gender-Based Refugee Claims” 3 *Journal of Law & Equality* 69, (2004), at 78.

⁵ The guidelines are not binding on adjudicators outside of USCIS. However, they have been cited in asylum decisions by immigration judges, the Board of Immigration Appeals, and federal courts. See, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995, Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service, USA, p. 1 (hereafter INS Gender Guidelines). In July 1995, the INS issued a memorandum, Follow Up on Gender Guidelines Training, to further clarify guidance. See, Melville R, Asylum Division, Office of International Affairs, *Follow Up on Gender Guidelines Training*, Memorandum to Asylum Office Directors, SAOs, AOs, (Washington, DC: 1995). The US Government has also issued the following related guidance since the 1995 memorandum: Department of Homeland Security, *Guidelines for Children’s Asylum Claims* (1998); Department of State, *Gender Guidelines for Overseas Refugee Processing* (2000) and the 2007 U.S. DOJ, Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration

interviewing and evaluating gender-related claims. In 2000, the UK Immigration Appeal Authority (IAA) launched their '*Asylum Gender Guidelines*' for use in the determination of asylum appeals in the UK. In 2006, following changes in emanation of the tribunal that took place in 2005, creating a single tier tribunal (the Asylum and Immigration Tribunal), the Gender Guidelines were summarily removed and declared not to be the policy of the AIT.⁶ Since which time offers to update them have been declined.⁷ On account of the positive impact which the UK IAA guidelines made in respects of FGM, and the call for them to be consulted by Home Office case-workers, the UK Gender Guidelines effectively remain in use and will therefore form a central focal point of analysis and discussion throughout this thesis.⁸

Whilst these guidelines can all be usefully compared with one another, notable differences exist between the legal environments of these countries, in matters of process and, to some extent, the substance of refugee determination. The objective is not to compare the merits of each system. Rather, the focus is exclusively on the gender-guidelines formulated. The effectiveness of the guidelines to respond to the issues raised by gender-related claims within their respective political, legal and administrative settings will be examined. The initial objective of this chapter, is therefore, to determine the

Court Cases Involving Unaccompanied Alien Children. While all these initiatives are welcome developments, they merely reinforce the principles laid down in the INS Gender Guidelines.

⁶ Jarvic C, "*Gender in Refugee Law: From the Margins to the Centre*", (2014). The edited version of this speech is available online via the Asylum Aid Website at <http://www.asylumaid.org.uk/gender-refugee-law-margins-centre/> (last accessed 1/5/17).

⁷ *Ibid.*

⁸ *Asylum Gender Guidelines*, Immigration Appellate Authority, UK, Nov. 2000, (hereafter referred to as the UK Gender guidelines). It should also be noted that the Home Office integrated the UK Gender Guidelines into its own instructions to asylum case-workers in March 2004 and again in 2006 (last updated 2010). Unless, otherwise noted, the UK Gender Guidelines will be the primary focus of this chapter in relation to the refugee determination process in Britain. This focus stems from the fact that the Home Office Asylum Policy Instruction on Gender does not substantially differ from the UK Gender Guidelines. In fact, the policy instruction, which is not as exhaustive as the UK Gender Guidelines, explicitly state that, "further information can also be obtained from the Asylum Gender Guidelines published by the Immigration Appellate Authority in November 2000". Thus, where relevant, consideration will also be given to the Home Office's 2010 *Gender Asylum Policy Instructions*. See, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, Home Office, 2010. Available online via the Gov.UK website at

<https://www.gov.uk/government/publications/gender-issue-in-the-asylum-claim-process> (last accessed 8/6/17). For a complete listing of Asylum Policy Instructions implemented by the Home Office in respects of all areas of the asylum determination process please refer to this website. See also, Bennett C, "*Relocation, Relocation: The Impact of Internal Relocation on Women Asylum Seekers*", (2008), at 11. This document is available online via the Asylum Aid website at http://www.asylumaid.org.uk/wp-content/uploads/2013/02/Relocation_Relocation_research_report.pdf (last accessed 8/6/17) (discussing the reluctance of the IAT to follow the UK Gender-Guidelines).

common and distinctive features of the guidelines. Beyond that, issues, which the guidelines create, expose or ignore, will also be identified. The reluctance of decision-makers to recognise certain state-sanctioned practices as potential forms of persecution, specifically domestic violence will be queried. This reluctance is surprising given the fact that the case studies have taken a zero-tolerance stance in respect of domestic violence within their respective jurisdictions. In addition to floodgates arguments,⁹ this reluctance as will be discussed in due course, suggests that notions of culture that animate refugee jurisprudence are deeply rooted in racial and gender stereotypes.¹⁰ Arguably, decision-makers are reluctant to grant refugee status in cases where the alleged gender violence appears like forms of gender-related violence that are pervasive within their own borders.¹¹

This chapter further aims to compare and critically assess the different strategies deployed by the three guidelines to establish a link between a woman's fear of persecution and a relevant convention ground. In effect, this examination will detail the strengths, weaknesses, and limitations of the guidelines, which ultimately affect the adjudication of

⁹ Another reason, as discussed in Chapter One concerns the floodgates argument. So far, each State that has chosen to recognise gender- persecution within its RDP, has had to contend with the argument (made by anti-immigration lobbies within governments and civil society) that such an inclusion would open a 'floodgate', swamping those countries with claimants. The case studies under consideration in this thesis are no exception. However, this fear as already discussed has little foundation. The experience of countries such as Canada and the US in adopting gender-guidelines attests to the fact that the 'floodgate' does not 'open'. Per UNHCR statistics, the percentage of women asylum seekers in Canada remained relatively stable across the five-year period from 1989 to 1993. In fact, Musalo argues, that the experience of Canada since 1993, and the US since the Matter of Kasinga decision further belie the floodgates myth: neither country has experienced a surge of claims following their acceptance of the legitimacy of gender-based claims. Lastly, accepting gender persecution as grounds for refugee status does not imply that all such applicants would be granted asylum. Recognising women's experiences merely affords equality of opportunity. It does not in any way require a State to accept more refugees. It is simply a means of reforming the RDP to more accurately and equitably include the experiences of those who form the majority of the world's displaced persons and refugees. See, Musalo K, "A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims", 29 Refugee Survey Quarterly 46, (2010), at 48. For further information on this issue see, Neal D, "Women as a Social Group: Recognising Sex-Based Persecution as a Grounds of Asylum", 20 Columbia Human Rights Law Review 203, (1988) and Minister of Employment and Immigration, 1982. as cited in Valji N, Hunt L & Moffett H, "Where are the Women? Gender Discrimination in Refugee Policies and Practice" 55 Agenda 61, (2003), at 68.

¹⁰ See, Sinha A, "Domestic Violence and US Asylum Law: Eliminating the 'Cultural Hook' for Claims Involving Gender-Related Persecution", 76 New York University Law Review 1562, (2001), at 1565.

¹¹ In other words, a more enlightened understanding of violence against women is needed and as Sinha argues, refugee claims based on gender persecution should be given the full consideration of refugee law based on a 'gendered' understanding of the political, social and institutional character of violence against women rather than on 'cultural' culpability. *Ibid*, at 1562.

refugee claims, based on gender-related forms of persecution. Due to the wide discretion afforded to States in both interpreting and applying the Refugee Convention definition and the need to control their borders, Part I looks at the objectives of the guidelines and how they protect female claimants fleeing persecution. Part II embarks on an examination of the substantive content of the guidelines. Part III addresses the actual interpretation and application of the refugee definition in a gender context. The conclusion identifies the limitations of the guidelines. It posits that procedural reform and development is needed within the domestic RDP to ensure that victims of gender-based violence have their claims heard in a gender-sensitive manner, within a process which enforces and secures their right to due process under the law.¹²

Before, examining the guidelines in the following sections, it is important to note that whilst the specific focus of the thesis is on examining the treatment of FGM within the RDP, the examination of the guidelines in this chapter will deliberately look at the treatment of gender-based violence generally. This approach helps to provide an insight into the way in which the case-studies treat violence against women generally and their attitudes to specific forms of gender violence, before examining the treatment of FGM within the RDP in Chapter Three.

I. Gender Guidelines: Do they Help Refugee Women?

Despite, or perhaps, because of the occurrence of gender inequality and violence against women globally, the individualised method of refugee determination under the Refugee Convention has failed to protect women who face serious harm and who are not adequately protected by their respective States. The very nature of gender discrimination, and the fact that many forms of violence are common to refugee receiving States, including the case-studies, as well as to the refugee producing States, tend to make some forms of violence almost invisible. Thus, whilst victims of FGM may be seen as having a real fear of persecution, victims of domestic violence and rape may be less easily

¹² Other salient subtopics addressed in this chapter include the meaning of persecution, the availability of state protection, the nexus between the persecution feared and a recognised persecution ground, and the definition of a PSG.

distinguished from women in the country of refuge, and her fear may be minimized.¹³ On the other hand, cultural practices such as FGM and bride burning not unique to Western States, tend to be hidden under the cloak of ‘culture’ and decision-makers may be inclined to be influenced by cultural relativism arguments. The use of gender guidelines, arguably, help to overcome these barriers for female refugees, because they are firmly rooted in various human rights instruments.

Stating the forms of oppression and violence endured by women, including domestic violence and rape, the gender guidelines aim to bring the reality of gender-based persecution into focus for the decision-makers and locate such forms of violence within the context of human rights. Essentially, the UNHCR and domestic gender-guidelines are supposed to make it easier to protect women through the Refugee Convention. Thus, the interpretation approach endorsed by the UNHCR and domestic States of the refugee definition is in theory a holistic, gender-sensitive interpretation. This interpretation takes into account the claimant’s personality, background and personal experiences, with an analysis and up to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin.¹⁴

Despite the positive objectives and undertones of the gender guidelines some criticisms need to be mentioned before proceeding. Firstly, one of the inherent dangers of the existing guidelines is the tendency of advocates to stereotype the claimant to easily fit the categories of the gender guidelines. Thus, an advocate may present a claimant as a passive victim fleeing a patriarchal society, asking a decision-maker to buy into those stereotypes, when in fact the reality of both the claimant and the State from which she comes is more complex. A second, more problematic criticism of gender guidelines is the backlash against them, based on reactionary, neoconservative and antifeminist attitudes towards women.¹⁵ This is particularly evident in cases involving the more universal forms of violence, including rape and domestic violence. In the case of domestic violence, Helena

¹³ Sadoway G, “*The Gender Factor in Refugee Determination and the Effect of Gender Guidelines*”, in Hajdukowski-Ahmed M, et al, “*Not Born a Refugee Woman – Contesting Identities, Rethinking Practices*”, Oxford: Berghahn Books, (2009), at 245.

¹⁴ *Ibid.* See also, UNHCR, “*Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*”, UN Doc. HCR/GIP/02/01, 7 May 2002. (Hereafter referred to as the UNHCR Gender Guidelines), Section IIA(6)-(8).

¹⁵ Sadoway, *supra* note 13, at 247.

Moussa suggests that decision-makers have been quick to applaud efforts by States to remedy protection issues, so that the passage of domestic violence legislation for instance might be enough to satisfy them that the situation has changed and that state protection is now available.¹⁶ Thirdly, as will be discussed in due course, decision-makers need to be continually trained on issues surrounding domestic violence, sexual violence and battered women syndrome.

Despite the existence of gender guidelines, some decision-makers are prone to make assumptions about victims of rape and domestic violence.¹⁷ In one Canadian case for instance it was assumed that a woman who was, ‘educated’ ‘intelligent’ and ‘assertive’ would not remain in a situation of spousal abuse.¹⁸ Such characteristics did not fit with the stereotype of a helpless victims. Her claim was found to be ‘exaggerated’ and ‘fabricated’.¹⁹ Similarly, rape is often regarded as a private, criminal act of lust, outside of the scope of the Refugee Convention.²⁰ Fourthly, the decision by States to use guidelines instead of incorporating into legislation the legal interpretative guidance and/or procedural safeguards of the UNHCR, reinforces the sovereignty of states and their ability to control refugee flows by retaining the right to decide who can and cannot enter their borders.²¹ Whilst States have a right to deny entry and a right to set visa and other entry requirements, political considerations and motivations should not be a determining factor. States have implemented various restrictive measures to ensure that refugees and other immigrants do not flux into their boundaries.²² Some have implemented visa requirements and carrier sanctions and have in some instances physically interdicted such claimants.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, at 148.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ The current notion of State sovereignty was laid down in the Treaty of Westphalia in 1648, which, in relation to States, codified the basic principles of territorial integrity, border inviolability, and supremacy of the State. For academic commentary on the Treaty of Westphalia and State Sovereignty *see generally*, Lyons GM & Mastanduno M, “*Beyond Westphalia? State Sovereignty and International Intervention*”, The John Hopkins University Press: London, (1995); Barkin J, “*The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms*”, 27 *Journal of International Studies* 229, (1998); Osiander A, “*Sovereignty, International Relations, and the Westphalian Myth*”, 55 *International Organisation* 251, (2001).

²² Heckman G, “*Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law*”, 15 *International Journal of Refugee Law* 212, (2003), at 213 (noting how States have attempted to control migration into their territories).

Others have devised measures to screen out economic migrants. For instance, the case-studies have adopted preliminary screening mechanisms, applied legislative or administrative presumptions of unfoundedness, truncated time limits, and restricted the rights of claimants to seek review of decisions.²³ Designed to limit access to refugee determination, these measures:

mark a reassertion by governments of a broad discretion in their treatment of aliens and erode the institutional and procedural safeguards that surround decision-making in asylum law and, in particular, those decisions that severely impact asylum seekers.²⁴

These measures have affected the ability of refugee claimants to either enter the host State, or to claim refugee status once they have crossed borders. In this regard, Sesay's contention that States pay lip service to the importance of honoring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders appears to be a reality.²⁵ In the wake of the 2016 world immigration crisis²⁶, after

²³ *Ibid*, at 213-4. *See also*, Goodwin-Gill G, *"The Refugee in International Law"*, (2nd ED), Clarendon Press: Oxford, (1996), at 191-3; Hailbronner K, *"The Right to Asylum and the Future of Asylum Procedures in the European Community"*, 2 *International Journal of Refugee Law* 341, (1990), at 344-6; Hydman P, *"The 1951 Convention and its Implications for Procedural Questions"*, 6 *International Journal of Refugee Law* 245, (1994), at 248-52; Billings P, *"A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims"*, 52 *Administrative Law Review* 253, (2000), at 259; Legomsky S, *"An Asylum Seekers Bill of Rights in a Non-Utopian World"*, 14 *Georgetown Immigration Law Review* 619, (2000), at 625-34; Acer E, *"Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States"*, 28 *Fordham International Law Journal* 1391, (2005); Robin-Oliver S, *"Immigration Law and Human Rights: Legal Line Drawing Post September 11: Symposium Article: Citizens and Non-Citizens in Europe: European Union Measures Against Terrorism After September 11"*, 25 *Boston College Third World Law Journal* 197, (2005).

²⁴ Heckman, *supra* note 22, at 214. Such decisions include eligibility decisions, where authorities decide whether asylum seekers are eligible to have their claims for protection examined; refugee determination decisions, where they decide, by reference to the 1951 Convention, whether the State recognises asylum seekers as refugees; risk of return assessments, where they decide whether the removal of non-Convention refugees would expose them to an objectively identifiable risk to life, extreme sanctions or inhuman treatment; and removal decisions generally. *Ibid*, at footnote 7.

²⁵ Sesay A, *"State Sovereignty: A Hindrance to Refugee Protection"*, (2010), available online via The Patriotic Vanguard Website at <http://www.thepatrioticvanguard.com/state-sovereignty-a-hindrance-to-refugee-protection> (last accessed 25/07/17).

²⁶ Described as the continent's worst humanitarian crisis since World War II, in 2015, over one million people - refugees, displaced persons and other migrants – made their way to the EU, either escaping conflict in their country and in search of better economic prospects. For further information *see*, European Commission, *"Refugee Crisis in Europe"*, (2016), available online via the European Commission website at http://ec.europa.eu/echo/refugee-crisis_en (last accessed 23/5/17); Kingsley P, *"The New Odyssey: The Story of Europe's Refugee Crisis"*, Guardian Faber: London, (2016); Lesser I, *"The Refugee Crisis:*

initially welcoming refugees in September 2015, European states are now refusing to share resettlement burdens and failing to take action that could help reduce the number of refugees drowning in the Mediterranean. Coupled with terrorist incidents throughout Europe and the US, States and citizens alike are more reluctant to accept refugees.²⁷ These fears, coupled with domestic political upheaval, have rendered several European States less willing to welcome refugees and have raised new questions about the long-term viability of European unity.²⁸ This is particularly evident considering the UK's decision to leave the European Union (EU). Arguably, this contentious immigration issue will have a detrimental effect on FGM claimants seeking refugee status. Finally, the gender-guidelines under examination are not binding-law, rather they are administrative directives.²⁹ Consequently, as will be discussed in due course, decision-makers do not need to consult them when making a refugee determination.

Despite these notable criticisms, the development of gender guidelines at the domestic level has made an improvement in the protection of women fleeing gender-based forms of violence and raised awareness of the inequality and, oppression endured by women. The guidelines implemented by the case-studies offer gender sensitive interpretations of the Refugee Convention definition. Whilst, their approaches are strikingly similar, each must abide by the jurisprudence of their respective higher courts. All three sets of guidelines outline forms of persecution directed primarily against women. Each addresses the question of whether women may constitute a PSG within the meaning of the Refugee Convention definition. Furthermore, each addresses the question of State protection, noting that a refugee claim may be established where a State persecutes directly or where the persecutor is a non-State actor, but the State is either unable or unwilling to protect the victim. The recognition of inherently 'private' forms of harm as constituting persecution within the meaning of the Refugee Convention is particularly

Perspectives from Across Europe and the Atlantic", Policy Brief: Washington, (2015). This document is available online at

file:///C:/Users/User/Downloads/LesserEtAl_MigrationCrisis_Sep15.pdf (last accessed 25/7/17). See also, Zizek S, "Against the Double Blackmail: Refugees, Terror and Other Troubles with the Neighbours", Penguin: UK, (2016).

²⁷ See, Zizek, *supra* note 26.

²⁸ Ignatieff M *et al*, "The Refugee and Migration Crisis: Proposals for Action, U.N. Summit 2016", The Brookings Institute: Massachusetts, (2016), available at <https://www.brookings.edu/research/the-refugee-and-migration-crisis-proposals-for-action-u-n-summit-2016/> (last accessed 19/5/17).

²⁹ See, Erdman J & Sanche, *supra* note 4, at 76. See also, Macklin, *supra* note 2, at 27.

important for those women fleeing FGM and those who face other gender-based forms of harm. Notably, the INS, UK and CIRB gender-guidelines, all acknowledge the precedent set by the Executive Office of the UNHCR in formulating guidelines and recommendations with respect to female refugees,³⁰ although each national initiative arguably goes much further and is more sophisticated in their substantive analyses. Furthermore, the case-studies also recognise the contribution of NGO's, scholars, and activists in the formulation of the guidelines.³¹

Guidelines alone, however are not enough to ensure good decision-making if the RDP itself lacks safeguards, and if decision-makers are not trained. Thus, as will be highlighted in Chapter Three, refugee determination has become about the, "luck of the draw".³² Reform of the RDP, can be achieved by examining innovative and effective procedural

³⁰ As discussed in Chapter One, throughout the 1980s and 1990s the UNHCR began to address and remedy many of the issues of gender-based persecution and violence as they pertain to female refugees. Therefore, prior to the adoption of domestic gender-guidelines, the UNHCR had already begun to acknowledge the specificity of female refugee's experiences and needs. In 1985 the Executive Committee of the UNHCR adopted Conclusion Number 39 concerning the international protection of refugee women. This Conclusion, for the first time, officially and internationally recognised that women and girls constituted the majority of the world's refugee population, and that many are victims of human rights violations solely on account of their gender. See, *Refugee Women and International Protection Report*, U.N. HCR Executive Comm., 36th Sess, para 115(4)(k), U.N. Doc. A/AG.96/673 (1985). Six years later in 1991, the Committee sought to effectively implement Conclusion Number 39 by releasing *Guidelines on the Protection of Refugee Women*, and in 1993 the UNHCR Executive Committee further issued *Conclusion Number 73* which called upon state parties and the UNHCR to ensure the equal access of women and men to RDP's, and further supported the recognition as refugees of persons with a well-founded fear of persecution through sexual violence. See, UNHCR Exec. Comm., Conclusion No. 73 Refugee Protection and Sexual Violence, para e., (1993), reprinted in UNHCR, *A Thematic Compilation of Executive Committee Conclusions on International Protection* (4th ed. 2009). See also, Saso D, "The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines" 8 *Hastings Women's Law Journal* 263, (1997), at 270. These were following in 2002 with the introduction of two further comprehensive guidelines on gender-related refugee claims. See, UNHCR Gender Guidelines, *supra* note 14 and UNHCR, *Guidelines of International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of Refugees*, U.N. Doc. HCR/GIP/02/02 (2002). (Hereafter referred to as the UNHCR, PSG Guidelines).

³¹ The INS Gender Guidelines describe the product as a 'collaborative effort'. INS Gender Guidelines, *supra* note 5, at 703. In Canada, a Working Group on Women Refugee Claimants had been active within the IRB since 1991, building relations with NGOs and gathering documentation relating to women refugees. See Liebich F & Ramirez J, "A History of Institutional Change: The Immigration and Refugee Board (Toronto) Working Group on Refugee Women" in Giles W *et al* (eds), "Development and Diaspora: Gender and the Refugee Experience" Dundas, Artemis Enterprises, (1996), at 100. The UK Gender Guidelines also acknowledge the assistance and information which has been obtained by various academics, organisation, and organisations; in particular the Refugee Women's Legal Group, whose own gender guidelines form the basis for the INS Gender Guidelines. They also acknowledge the work of the UNHCR, judges and the authors of the CIRB, INS and Australian gender guidelines. See also, UK Gender guidelines, *supra* note 8, at Thanks and Acknowledgement.

³² Sadoway, *supra* note 13, at 249.

developments and learning from practices and gender-specific processes implemented in other legal/quasi-judicial forums which address equally challenging and complex gender forms of violence.

Before proceeding, it should also be noted that all three guidelines deal with the process by which women's claims are heard, as well as the substance of the refugee definition as it applies to women making gender-related claims. The content of the advice given is also very similar. As will be illustrated throughout this chapter, each country has a distinctive administrative and legal context within which refugee determinations are made, and their respective guidelines reflect these differences. Moreover, even though the case-studies apply the same refugee definition, the interpretation varies between the jurisdictions, and this also affects the interpretive space available to the drafters of the guidelines to respond sensitively to gender-related claims.³³

A. The Decision-making Bodies: Structures and Processes

Although the US, Canada and the UK have all adopted the same refugee definition, the process for determining refugee status remains under the control of the State. It is thus, useful at the outset to outline the different legal and administrative contexts in which these guidelines operate.

1. Canada

The Canadian court system is complex, like the society which it serves. There are several levels and types of court, and questions of jurisdiction can be difficult to sort out, especially since courts that share the same functions may go by different names.³⁴ Within

³³ Macklin, *supra* note 2, at 30.

³⁴ Canadian Department of Justice, "Canada's Court System", (2015), at 1. This document is available online via the Canadian Department of Justice website at <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/pdf/courten.pdf> (last accessed 12/4/17) (noting that Both the federal government and the provincial and territorial governments pass laws, and they also share the administration of justice, but the relationship is not simple. For instance, the provinces and territories are responsible for providing everything necessary for their courts, from building and maintaining the courthouses, to providing staff and resources such as interpreters, court reporters to prepare transcripts, sheriffs, and registry services, to paying provincial/territorial court judges; yet the judges for the superior courts are appointed and paid by the federal

the Canadian context there are effectively four levels of courts. First there are provincial/territorial courts, which handle the great majority of cases that come into the system.³⁵ Second are the provincial/territorial superior courts. These courts deal with more serious crimes and also take appeals from provincial/territorial court judgments.³⁶ On the same level, but responsible for different issues, is the Federal Court.³⁷ At the next level are the provincial/territorial courts of appeal and the Federal Court of Appeal,³⁸

government. Administration of the Supreme Court of Canada and federally created courts is the responsibility of the federal government).

³⁵ Each province and territory, with the exception of Nunavut, has a provincial/territorial court, and these courts hear cases involving either federal or provincial/territorial laws. (In Nunavut, there is no territorial court – matters that would normally be heard at that level are heard by the Nunavut Court of Justice, which is a superior court.) The names and divisions of these courts may vary from place to place, but their role is the same. Provincial/territorial courts deal with most criminal offences, family law matters (except divorce), young persons in conflict with the law (from 12 to 17 years old), traffic violations, provincial/territorial regulatory offences, and claims involving money, up to a certain amount (set by the jurisdiction in question). Private disputes involving limited sums of money may also be dealt with at this level in Small Claims courts. In addition, all preliminary inquiries – hearings to determine whether there is enough evidence to justify a full trial in serious criminal cases – take place before the provincial/territorial courts. A number of courts at this level are dedicated exclusively to particular types of offences or groups of offenders, i.e. Drug Treatment Courts, Domestic Violence Courts and Youth Courts to name but a few. *See, “Canada’s Court System”, supra note 34, at 2-3.*

³⁶ *Ibid.*, at 3-4. “Each province and territory has superior courts. These courts are known by various names, including Superior Court of Justice, Supreme Court (not to be confused with the Supreme Court of Canada), and Court of Queen’s Bench. But while the names may differ, the court system is essentially the same across the country, with the exception, again, of Nunavut, where the Nunavut Court of Justice deals with both territorial and superior court matters. The superior courts have “inherent jurisdiction,” which means that they can hear cases in any area except those that are specifically limited to another level of court. The superior courts try the most serious criminal and civil cases, including divorce cases and cases that involve large amounts of money (the minimum is set by the province or territory in question). In most provinces and territories, the superior court has special divisions, such as the family division. Some have established specialized family courts at the superior court level to deal exclusively with certain family law matters, including divorce and property claims. The superior courts also act as a court of first appeal for the underlying court system that provinces and territories maintain. Although superior courts are administered by the provinces and territories, the judges are appointed and paid by the federal government”. *Ibid.*

³⁷ *Ibid.*, at 4-5. “The Federal Court and Federal Court of Appeal are essentially superior courts with civil jurisdiction. However, since the Courts were created by an Act of Parliament, they can only deal with matters specified in federal statutes (laws). In contrast, provincial and territorial superior courts have jurisdiction in all matters except those specifically excluded by a statute. The Federal Court is the trial-level court; appeals from it are heard by the Federal Court of Appeal. While based in Ottawa, the judges of both Courts conduct hearings across the country. The Courts’ jurisdiction includes inter-provincial and federal-provincial disputes, intellectual property proceedings (e.g. copyright), citizenship appeals, *Competition Act* cases, and cases involving Crown corporations or departments of the Government of Canada. As well, only these Courts have jurisdiction to review decisions, orders and other administrative actions of federal boards, commissions and tribunals; these bodies may refer any question of law, jurisdiction or practice to one of the Courts at any stage of a proceeding. For certain matters, such as maritime law, a case may be brought either before the Federal Court or Federal Court of Appeal, or before a provincial or territorial superior court. In this respect, the Federal Court and the Federal Court of Appeal share jurisdiction with the superior courts”. *Ibid.*

³⁸ *Ibid.*, at 4. “Each province and territory has a court of appeal or appellate division that hears appeals from decisions of the superior courts and provincial/territorial courts. The number of judges on these courts may

while the highest level is occupied by the Supreme Court of Canada.³⁹ There are many other elements in the Canadian justice system which are closely related to the courts but are not strictly part of the court system, a prominent example being administrative tribunals.⁴⁰

The Immigration and Refugee Board of Canada (IRB) is Canada's largest independent administrative tribunal. It is responsible for making well-reasoned decisions on immigration and refugee matters, efficiently, fairly and in accordance with the law. The IRB decides, among other responsibilities, who needs refugee protection among the thousands of claimants who come to Canada annually.⁴¹ It consists of four tribunals,

vary from one jurisdiction to another, but a court of appeal usually sits as a panel of three. The courts of appeal also hear constitutional questions that may be raised in appeals involving individuals, governments, or governmental agencies". *Ibid.*

³⁹ *Ibid.*, at 6-7. "The Supreme Court of Canada is the final court of appeal from all other Canadian courts. The Supreme Court has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law. The Court consists of a Chief Justice and eight other judges, all appointed by the federal government. The *Supreme Court Act* requires that at least three judges must come from Quebec. Traditionally, of the other six judges, three come from Ontario, two from western Canada, and one from the Atlantic provinces. The Supreme Court sits in Ottawa for three sessions a year – winter, spring and fall. Before a case can reach the Supreme Court of Canada, it must have used up all available appeals at other levels of court. Even then, the Court must grant permission or "leave" to appeal before it will hear the case. Leave applications are usually made in writing and reviewed by three members of the Court, who then grant or deny the request without providing reasons for the decision. Leave to appeal is not given routinely – it is granted only if the case involves a question of public importance; if it raises an important issue of law or mixed law and fact; or if the matter is, for any other reason, significant enough to be considered by the country's Supreme Court. In certain situations, however, the right to appeal is automatic. For instance, no leave is required in criminal cases where a judge on the panel of a court of appeal has dissented on how the law should be interpreted. Similarly, where a court of appeal has found someone guilty who had been acquitted at the original trial, that person automatically has the right to appeal to the Supreme Court. The Supreme Court of Canada also plays a special role as adviser to the federal government. The government may ask the Court to consider questions on any important matter of law or fact, especially concerning interpretation of the Constitution. It may also be asked questions on the interpretation of federal or provincial/territorial legislation or the powers of Parliament or the legislatures. (Provincial and territorial courts of appeal may also be asked to hear references from their respective governments)". *Ibid.*

⁴⁰ "Canada's Court System", *supra* note 34, at 9.

⁴¹ Citizenship and Immigration Canada (CIC) has the overall responsibility for immigration and refugee matters. CIC determines claims for refugee protection made abroad at Canadian embassies and consulates. It is responsible for selecting immigrants, issuing visitors' visas, and granting citizenship. It is also CIC that determines the eligibility of all refugee protection claims made in Canada and refers eligible claims to the IRB for a decision. The Canada Border Services Agency (CBSA) is responsible for carrying out enforcement functions related to immigration and refugee matters. These include detention, removals, investigations, and intelligence and immigration control functions overseas. The IRB reports to Parliament through the Minister of Citizenship and Immigration, but the IRB remains independent from CIC and the Minister. For further information on the mandate of the IRB please refer to the IRB website at <http://www.irb-cisr.gc.ca/Eng/BoaCom/Pages/index.aspx> (last accessed 20/4/17). Decisions of the Immigration Division, the Immigration Appeal Division and the Refugee Protection Division are all subject

which are designated as divisions: (1) the Refugee Protection Division;⁴² (2) the Immigration Division;⁴³ (3) the Immigration Appeal Division;⁴⁴ and (4) the Refugee Appeal Division.⁴⁵ Members of the IRB are appointed by the Cabinet, and their formal independence from government is a key feature of the Canadian refugee system. Members hear and determine claims from all refugee claimants who make port of entry or inland claims in Canada, regardless of when or how they arrived.⁴⁶

The CIRB Gender-Guidelines were promulgated by the Chair of the IRB,⁴⁷ and only apply to members of the IRB. They do not apply to visa officers abroad, with the consequence that women who apply for refugee status outside of Canada's borders do not benefit from the protection of the CIRB Gender-Guidelines.⁴⁸ While each division of the IRB is responsible for making decisions on different immigration or refugee matters, they all follow an administrative tribunal process like what happens in a court, though less formal. The process is flexible and can take many forms so long as it ensures that the IRB makes well-reasoned, efficient and fair decisions. A claim for refugee protection can be made by speaking to an officer at any port of entry when a claimant arrives in Canada, or at an inland office. An officer from the CBSA or CIC will decide whether a claim is

to judicial review, with leave, by a Higher Court, namely, the Federal Court of Canada – Trial Division. Decisions of that Court are subject to further appeal to the Federal Court of Appeal, if the Trial Division certifies a question, and then to the Supreme Court of Canada, with leave. Decisions of the Supreme Court are final and binding on the federal courts and the courts from all provinces and territories. *See*, IRB, “*Policy on the Use of Jurisprudential Guides*”, (2003), available online via the IRB website at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolIntervention.aspx> (last accessed 22/5/17). The IRB must follow decisions of the Federal Court and the Supreme Court of Canada. However, a decision of any division of the IRB is not binding on a subsequent panel of that division. *Ibid*

⁴² The Refugee Protection Division decides claims for refugee protection made within Canada.

⁴³ The Immigration Division conducts immigration admissibility hearings for certain categories of people believed to be inadmissible to, or removable from, Canada under the law and conducts detention reviews for those being detained under the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27).

⁴⁴ The Immigration Appeal Division hears appeals of sponsorship applications refused by officials of Citizenship and Immigration Canada (CIC); appeals from certain removal orders made against permanent residents, refugees and other protected persons, and holders of permanent resident visas; and appeals by permanent residents who have been found outside of Canada not to have fulfilled their residency obligation; and appeals by CIC from decisions of the Immigration Division at admissibility hearings.

⁴⁵ The Refugee Appeal Division was created by the *Immigration and Refugee Protection Act* in November 2001.

⁴⁶ Macklin, *supra* note 2, at 30. *See also*, IRB, *Procedures*, (2010), available online at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/procedures/Pages/index.aspx> (last accessed 23/5/17) (discussing the various tribunals and their duties).

⁴⁷ Pursuant to authority granted under the Immigration Act, Section 65(3).

⁴⁸ For instance, about half of all refugees admitted into Canada in 1997 were selected from overseas. *See*, Macklin, *supra* note 2, at 30.

eligible to be referred to the IRB. If eligible, a claim will be referred to the Refugee Protection Division of the IRB to start the claim for refugee protection process.⁴⁹

The IRB then selects one of three possible ways to decide the claim: a fast-track expedited process; a fast-track hearing; or a full hearing. The fast-track expedited process is used for claims from certain countries or for certain types of claims. The categories of claims change from time to time, for example, depending on country conditions. In the expedited process, the refugee protection officer interviews the claimant. The officer then makes a recommendation about the claim. If the recommendation is favorable, the claim is forwarded to a member who will decide if it should be accepted without a hearing. A hearing is held if the claimant is not granted refugee protection through the expedited process. Fast-track hearings are held for claims that appear to be simple because they may be decided on the basis of one or two issues. A refugee protection officer does not attend these hearings.⁵⁰ Finally, full hearings are held for claims that involve more than two issues and may be complex. Full hearings follow the general tribunal process described above. In a limited number of cases, Minister's counsel participates in the hearing to argue against the claim. A refugee protection officer may assist the member to ensure that all relevant evidence is presented. Representatives of the UNHCR may observe the hearing.⁵¹

The IRB will assign the claimant to one of these processes. It should be noted that whilst at the Refugee Protection Division, individual claims are normally heard by a single member, in some circumstances the Chairperson may request a panel consisting of three members.⁵² Claimants are usually represented by counsel and are entitled to legal aid in most provinces.⁵³ A Refugee Hearing Officer assists the panel by presenting documentary

⁴⁹ IRB, “*Claimant’s Guide*”, (2013), available online via the IRB website at http://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/ClaDemGuide.aspx#_Toc340245781 (last accessed 24/5/17).

⁵⁰ International Business Publications, “*Canada: Immigration Handbook – Strategic and Practical Information*”, International Business Publications: Washington, (2013), at 132.

⁵¹ IRB, “*Interpreter Handbook*”, (2007), at 10. This document is available online via the Canadian IRB website at <http://www.irb-cisr.gc.ca/Eng/BoaCom/pubs/Pages/Interpret.aspx> (last accessed 4/5/17). (Hereafter referred to as the IRB Interpreters Handbook).

⁵² If three members sit on the panel, the decision of the majority is the decision of the Panel. *See*, Dolin B & Young B, “*Canada’s Refugee Protection System*” (2002), available online at <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp185-e.htm> (last accessed 8/6/17).

⁵³ In Prince Edward Island, New Brunswick and Nova Scotia, legal aid is denied to refugee claimants and they often appear unrepresented. Macklin, *supra* note 2, at 31. *See also*, Buckley M, “*The Legal Aid Crisis: Time for Action*”, Canadian Bar Association: Ottawa, (2000), at 43 (stating that “refugee women who make claims of gender persecution are being denied legal aid coverage for their residency applications; even when there is coverage for refugee claimants, the tariffs are so low that lawyers simply refuse cases”).

evidence relating to the case, and questioning the claimant. The panel may also question the claimant. The IRB supplies professional interpreters for the refugee determination hearing and proceedings are usually recorded on tape. Transcripts may be ordered for purposes of seeking leave to apply for judicial review to the Federal Court of Canada.⁵⁴

In December 2012, refugee reform provisions that amended the *IRPA* came into force. These amendments significantly modified the refugee determination process at the IRB. Specifically, the amendments allowed for regulatory time limits to be implemented which require refugee claims be heard within 30, 45, or 60 days, with limited exceptions.⁵⁵ Prior to the 2012 reforms, refugee claim hearings were not subject to time limits.

2. US

The US judicial system is made up of two different court systems: the federal court system and the state court systems. While each court system is responsible for hearing certain types of cases, neither is completely independent of the other, and the systems often interact.⁵⁶ Within the State court system, no two systems are exactly alike. Most, however, are made up of (1) two sets of trial courts: (a) trial courts of limited jurisdiction⁵⁷ and (b)

⁵⁴ Macklin, *supra* note 2, at 31. *See also*, IRB Interpreters Handbook, *supra* note 51.

⁵⁵ IRB, “Policy on the Expedited Processing of Refugee Claims by the Refugee Protection Division”, (2015), available online at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/polRpdSprExpProAcc.aspx> (last accessed 23/4/17).

⁵⁶ The U.S. Constitution created a governmental structure for the US known as federalism. Federalism refers to a sharing of powers between the national government and the state governments. The Constitution gives certain powers to the federal government and reserves the rest for the states. Therefore, while the Constitution states that the federal government is supreme with regard to those powers expressly or implicitly delegated to it, the states remain supreme in matters reserved to them. This supremacy of each government in its own sphere is known as separate sovereignty, meaning each government is sovereign in its own right. Both the federal and state governments need their own court systems to apply and interpret their laws. Furthermore, both the federal and state constitutions attempt to do this by specifically spelling out the jurisdiction of their respective court systems. *See*, Administrative Office of the US Courts, “Understanding Federal and State Courts”, (2010), available online via the US Courts website at <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx> (last accessed 3/1/16). Hereafter referred to as “Understanding Federal and State Courts”.

⁵⁷ Trial courts of limited jurisdiction are courts that deal with only specific types of cases. They are often located in/near the county courthouse and are usually presided over by a single judge. A judge sitting without a jury hears most of the cases heard by these courts. Some examples of trial courts of limited jurisdiction include:

trial courts of general jurisdiction (main trial-level courts);⁵⁸ (2) intermediate appellate courts (in many, but not all, states);⁵⁹ and (3) the highest state courts (called by various names).⁶⁰ Unlike federal judges, most state court judges are not appointed for life but are either elected or appointed (or a combination of both) for a certain number of years.⁶¹

Most of the federal court system is divided into districts and circuits. There is at least one federal district in every state, but populous states can have multiple districts. Generally, federal cases begin at the district level in a federal court.⁶² Each federal circuit

□ *Probate court*: This court handles matters concerning administering the estate of a person who has died (decedent). It sees that the provisions of a will are carried out or sees that a decedent's property is distributed according to state law if he/she died intestate (without a will).

□ *Family court*: This court handles matters concerning adoption, annulments, divorce, alimony, custody, child support, etc.

□ *Traffic court*: This court usually handles minor violations of traffic laws.

□ *Juvenile court*: This court usually handles cases involving delinquent children under a certain age, for example, 18 or 21.

□ *Small claims court*: This court usually handles suits between private persons of a relatively low dollar amount, for example, less than \$5,000.

□ *Municipal court*: This court usually handles cases involving offences against city ordinances.

⁵⁸ Trial courts of general jurisdiction are the main trial courts in the state system. They hear cases outside the jurisdiction of the trial courts of limited jurisdiction. These involve both civil and criminal cases. One judge (often sitting with a jury) usually hears them. In such cases, the judge decides issues of law, while the jury decides issues of fact. A record of the proceeding is made and may be used on appeal. These courts are called by a variety of names, including (1) circuit courts, (2) superior courts, (3) courts of common pleas, (4) and even, in New York, supreme courts. In certain cases, these courts can hear appeals from trial courts of limited jurisdiction.

⁵⁹ Many, but not all, states have intermediate appellate courts between the trial courts of general jurisdiction and the highest court in the state. Any party, except in a case where a defendant in a criminal trial has been found not guilty, who is not satisfied with the judgment of a state trial court may appeal the matter to an appropriate intermediate appellate court. Such appeals are usually a matter of right (meaning the court must hear them). However, these courts address only alleged procedural mistakes and errors of law made by the trial court. They will usually neither review the facts of the case, which have been established during the trial, nor accept additional evidence. These courts usually sit in panels of two or three judges.

⁶⁰ All states have some sort of highest court. While they are usually referred to as supreme courts, some, such as the highest court in Maryland, are known as courts of appeal. In states with intermediate appellate courts, the highest state courts usually have discretionary review as to whether to accept a case. In states without intermediate appellate courts, appeals may usually be taken to the highest state court as a matter of right. Like the intermediate appellate courts, appeals taken usually allege a mistake of law and not fact. In addition, many state supreme courts have original jurisdiction in certain matters. For example, the highest courts in several states have original jurisdiction over controversies regarding elections and the reapportionment of legislative districts. These courts often sit in panels of three, five, seven, or nine judges/justices.

⁶¹ “*Understanding Federal and State Courts*”, *supra* note 56.

⁶² The US district courts are the trial courts of the federal court system. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico. Each district includes a US bankruptcy court as a unit of the district court. Three territories of the US — the Virgin Islands, Guam, and the Northern Mariana Islands — have district courts that hear federal cases, including bankruptcy cases. There are two special trial courts that have nationwide jurisdiction over certain types of cases. The Court of International Trade addresses

includes more than one district and is home to a Federal Court of Appeal.⁶³ At the head of the federal court system is the U.S. Supreme Court.⁶⁴ The judgment of the Supreme Court is final.⁶⁵

Like its Canadian counterpart there also exist a number of other entities, which exist outside of the judicial branch, such as the Federal administrative agencies and Boards, including those dealing with asylum and immigration matters. An applicant for asylum begins the process either already in the US or at a port of entry seeking admission. This process differs from a potential refugee who begins a separate process outside of the US. Depending on whether or not the claimant is currently in removal proceedings, two avenues exist to seek asylum: (1) affirmative applications; and (2) defensive applications.⁶⁶

To obtain asylum through the affirmative asylum process a claimant must be physically present in the US. They may apply for asylum status regardless of how they arrived in the US or their current immigration status.⁶⁷ They must apply for asylum within one year of the date of their last arrival in the US, unless they can show, firstly that they have changed

cases involving international trade and customs issues. The US Court of Federal Claims has jurisdiction over most claims for money damages against the US, disputes over federal contracts, unlawful "takings" of private property by the federal government, and a variety of other claims against the US. *See*, Mechan L, "Understanding the Federal Courts", (2017), at 8. This document is available online at <http://www.uscourts.gov/understand03/media/UFC03.pdf> (last accessed 27/3/10).

⁶³ The 94 judicial districts are organized into 12 regional circuits, each of which has a US court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialised cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims. *Ibid*, at 8.

⁶⁴ The US Supreme Court consists of the Chief Justice of the US and eight associate justices. At its discretion, and within certain guidelines established by Congress, the Supreme Court each year hears a limited number of the cases it is asked to decide. Those cases may begin in the federal or state courts, and they usually involve important questions about the Constitution or federal law. *Ibid*, at 9. The nine justices who sit on the Supreme Court are nominated by the President and approved by the U.S. Senate. They can remain on the court until their death or until they resign.

⁶⁵ Lovorn K, "Overview of the United States Court System", (2002), available online via the Animal Legal & Historical Center website at <http://www.animallaw.info/articles/dduspleadingsoutline.htm#Structure> (last accessed 25/7/17).

⁶⁶ Wasem R, "CRS Report for Congress: Asylum and 'Credible Fear Issues in U.S. Immigration Policy", (2011), at 6. This report is available online at <https://fas.org/sgp/crs/homesecc/R41753.pdf> (last accessed 25/7/17). *See also*, U.S. Citizenship and Immigration Services, "Obtaining Asylum in the United States", (2015), available online via the U.S. Citizenship and Immigration Services website at <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last accessed 23/5/17).

⁶⁷ An individual may apply for affirmative asylum by submitting Form I-589, Application for Asylum and for Withholding of Removal, to USCIS. *See*, U.S. Citizenship and Immigration Services, "Obtaining Asylum in the United States", *supra* note 66.

circumstances that materially affect their eligibility for asylum or extraordinary circumstances relating to the delay in filing. Secondly, they must have filed within a reasonable amount of time given those circumstances. If unsuccessful, the case is referred to an Immigration Judge at the Executive Office for Immigration Review (EOIR). The Immigration Judge conducts a ‘de novo’ hearing of the case. This means that the judge conducts a new hearing and issues a decision that is independent of the decision made by USCIS.⁶⁸

A defensive application for asylum occurs when a claimant requests asylum as a defense against removal from the U.S. EOIR’s immigration judges and the BIA, entities in the Department of Justice separate from the USCIS, have exclusive control over such claims and are under the authority of the Attorney General.⁶⁹ Immigration Judges hear defensive asylum cases in adversarial (courtroom-like) proceedings.⁷⁰ The judge will hear arguments from both of the following parties: the claimant, legal representative and the US Government, which is represented by an attorney from Immigration and Customs Enforcement. The Immigration Judge then decides whether the individual is eligible for asylum. If found eligible, the Immigration Judge will order asylum to be granted. If found ineligible for asylum, the Immigration Judge will determine whether the individual is eligible for any other forms of relief from removal. If found ineligible for other forms of relief, the Immigration Judge will order the individual to be removed from the US. The

⁶⁸ *Ibid.* Distinct from asylum law and policy, aliens claiming relief from removal due to torture may be treated separately under regulations implementing the United Nations Convention Against Torture. For a full legal analysis of this convention, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia, footnote 3. As cited in CRS Report for Congress, ‘*US Immigration Policy on Asylum Seekers*’ (2005), available online at <http://www.fas.org/sgp/crs/misc/RL32621.pdf> (last accessed 25/7/17).

⁶⁹ Wasem, *supra* note 66, at 13.

⁷⁰ Usually an individual will be placed into defensive asylum processing in one of two ways. One they are referred to an Immigration Judge by USCIS after they have been determined to be ineligible for asylum at the end of the affirmative asylum process. Secondly, they were placed in removal proceedings because they were caught at a port of entry without proper legal documents or in violation of their immigration status; or were caught by U.S. Customs and Border Protection trying to enter the US without proper documentation, were placed in the expedited removal process, and were found to have a credible fear of persecution or torture by an Asylum Officer.

Immigration Judge's decision can be appealed by either party to the BIA⁷¹ and a right to review in a federal court thereafter.⁷²

The process before the asylum officer, immigration judge and BIA is relatively informal, usually with single-member panels making determinations.⁷³ The majority of cases at the BIA are adjudicated by a single board member, unless the case falls into one of six categories that require a decision by a panel of three Board Members.⁷⁴ Like the

⁷¹ The BIA or Board is the highest administrative body for interpreting and applying immigration laws. It is authorized up to 17 Board Members, including the Chairman and Vice Chairman who share responsibility for Board management. The Board is located at EOIR headquarters in Falls Church, Virginia. Generally, the Board does not conduct courtroom proceedings - it decides appeals by conducting a "paper review" of cases. On rare occasions, however, the Board does hear oral arguments of appealed cases, predominately at headquarters. The BIA has been given nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges and by District Directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the US is one party and the other party is either an alien, a citizen, or a business firm. In addition, the BIA is responsible for the recognition of organizations and accreditation of representatives requesting permission to practice before DHS, the Immigration Courts, and the BIA. *See*, US Department of Justice, "*Board of Immigration Appeals*", (2016), available online at <https://www.justice.gov/eoir/board-of-immigration-appeals> (last accessed 27/5/17).

⁷² Within the US, there are different levels of refugee decisions. Firstly, there are immigration judge decisions, which are unpublished, and not binding on anyone. They affect only the applicant him or herself. The next level of decision is at the administrative appeals body – the BIA. Whether a BIA decision is binding on other courts depends on whether it is issued as published or not. Most decisions by the BIA are unpublished and thus not binding, but some are issued as binding precedent. Those cases then would bind immigration courts (judges) and DHS officers across the US, unless modified or overruled by the Attorney General or a Federal court. While BIA decisions are not "binding" on federal courts, the courts give great deference to the agency decisions in their review. The next level of appeal is the federal circuit courts of appeal. Furthermore, Federal Circuit court decisions can/may be binding, but it depends on a few factors. First, some of the circuit decisions are unpublished, and thus also not binding on anyone other than the claimant. Second, some decisions are clearly based solely on the facts of a particular case, rather than a broader legal issue, and thus would not really affect others. If, however, a published decision is issued by a circuit court, it would bind immigration judges within the particular circuit, and it would also be controlling on the BIA's review of any cases coming from the particular circuit. However, in some instances, the BIA can supersede a circuit court's prior ruling on an issue. Finally, any decisions issued by the US Supreme Court, the highest court in the country, would bind all circuit courts, the BIA, and immigration judges. Information supplied by Lisa Frydman, Managing Attorney, Centre for Gender and Refugee Studies (on file with the author).

⁷³ *See*, Board of Immigration Appeals, "*Practice Manual*", (2015), at 3. This manual is available online at <https://www.justice.gov/eoir/file/431306/download> (last accessed 28/5/17).

⁷⁴ These categories are: 1. the need to settle inconsistencies among the rulings of different immigration judges; 2. the need to establish a precedent construing the meaning of laws, regulations, or procedures; 3. the need to review a decision by an Immigration Judge or DHS that is not in conformity with the law or with applicable precedents; 4. the need to resolve a case or controversy of major national import; 5. the need to review a clearly erroneous factual determination by an Immigration Judge; and 6. the need to reverse the decision of an Immigration Judge or DHS in a final order, other than nondiscretionary dispositions. Cases not suitable for consideration by a single Board Member are adjudicated by a panel consisting of three Board Members. The panel of three Board Members renders decisions by majority vote. Cases are assigned to specific panels pursuant to the Chairman's administrative plan. The Chairman may change the composition of the sitting panels and may reassign Board Members from time to time. The Board may, by majority vote or by direction of the Chairman, assign a case or group of cases for full en banc consideration. 8 C.F.R. § 1003.1(a)(5). By regulation, en banc proceedings are not favoured. *See*, US Department of

Canadian system, the US immigration system has also undergone a number of reforms.⁷⁵ In 2002, the then-Attorney General John Ashcroft announced plans to streamline BIA reviews of immigration decisions in order to reduce an increasing backlog of cases.⁷⁶ These changes, essentially reversed the course set by the previous attempts at streamlining.⁷⁷ Prior to the 2002 changes, most appeals to the BIA were reviewed by a three-judge panel, which characteristically issued written opinions.⁷⁸ Ashcroft's changes, however, reversed this course, requiring review by a single BIA member in most cases,⁷⁹ and instructing an increase in one-sentence summary orders.⁸⁰ Furthermore, the 2002 reforms, reduced the BIA's 'scope of review', resulting in fewer cases meeting the eligibility requirements for any consideration by the Board.⁸¹ According to Burkhardt, the BIA is now more likely to dispose of cases that it does not hear without opinion.⁸² The 2002 reforms, however, prohibit BIA members from issuing a written opinion in cases where they are simply affirming an immigration judge's decision.⁸³ In such cases, the BIA does not even have discretion over the wording of his/her opinion; that language was dictated by the procedural reforms.⁸⁴ Most significantly, the 2002 reforms halved the

Justice, "Board of Immigration Appeals", (2016), available online at <https://www.justice.gov/eoir/board-of-immigration-appeals> (last accessed 27/5/17), at 3-4.

⁷⁵ For inform on the development and reform of the US immigration system, see, Acer E & Hughes A, "The Post-September 11 Asylum System", 32 Litig 41, (2006), at 43, as cited in Vaala L, "Bias on the Bench: Raising the Bar for US Immigration Judges to Ensure Equality for Asylum Seekers", 49 William & Mary Law Review 1017, (2008).

⁷⁶ Acer & Hughes, *supra* note 75, at 43, as cited in Vaala L, "Bias on the Bench: Raising the Bar for US Immigration Judges to Ensure Equality for Asylum Seekers", 49 William & Mary Law Review 1017, (2008), footnote 30. Between 1992 and 2000, the number of appeals filed with the BIA doubled. Eventually, the number of appeals pending was more than the BIA could handle and a backlog developed. Growing steadily from 20,000 in 1992, the backlog reached a staggering 60,000 cases by 2000. In an attempt to decrease⁴ this backlog, changes were made to BIA procedures in 1995. Most significantly, the size of the Board grew from five members to twelve. By 2002, before the Ashcroft changes, the number of BIA members had grown to twenty-three. See, Burkhardt S, "The Contours of Conformity: Behavioural Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures", 19 Georgetown Immigration Law Journal 35, (2004), at 44-45.

⁷⁷ Burkhardt, *supra* note 76, at 45.

⁷⁸ Acer & Hughes, *supra* note 75, at 43.

⁷⁹ Acer & Hughes, *supra* note 75, at 43; Burkhardt, *supra* note 76, at 47 (noting that the 2002 Procedural Reforms 'dramatically expanded this summary form of review'.)

⁸⁰ Acer & Hughes, *supra* note 75, at 43; Burkhardt, *supra* note 76, at 49.

⁸¹ Vaala, *supra* note 75, at 1019; Acer & Hughes, *supra* note 75, at 43.

⁸² Burkhardt, *supra* note 76, at 49.

⁸³ *Ibid*, at 49-50.

⁸⁴ Vaala, *supra* note 75, at 1020. See also 8 C.F.R. Section 1003.1(e)(4)(B)(ii)(e)(5) (2006) (instructing that orders affirming a decision below without opinion shall read as follows 'The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination'.... An order affirming without opinion.... shall not include further explanation or

number of BIA members from twenty-three to eleven.⁸⁵ This reduction according to Vaale has affected not only the Boards size, but also its character⁸⁶ and the number of cases filed within the federal courts.⁸⁷

Following a review of EOIR in 2006, then Attorney-General Alberto Gonzales directed EOIR to implement a number of specific measures to enhance the performance of the immigration courts and the BIA.⁸⁸ The memorandum required the institution of performance evaluations, trial periods after appointment, written immigration law exams for Board members, improved training, mechanisms to detect poor conduct and quality in Board adjudication, and a complainants procedure.⁸⁹ The measures further proposed changes to the 2002 Streamlining Reforms⁹⁰ to encourage the use of one-member written opinions and three member panels, and to encourage the publication of precedent.⁹¹ The response to these reforms were piecemeal⁹² and in an effort to implement them in 2008 the DOJ proposed further revisions.⁹³ Those reforms made changes to the use of

reasoning”). The 2002 Procedural reforms it should also be noted also authorise the use of summary decisions for cases meriting remand and modification. Burkhardt, *supra* note 76, at 50.

⁸⁵ *Ibid*, at 51; See also Durham D, “*The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in US Immigration Courts*”, 81 Notre Dame Law Review 655, (2006), at 682 (noting that the size of the BIA had grown from five to twenty-three under Ashcroft’s predecessors).

⁸⁶ Vaala, *supra* note 75, at 1020; Burkhardt, *supra* note 76, at 51.

⁸⁷ Vaala, *supra* note 75, at 1021 & footnotes 70-75 and accompanying text.

⁸⁸ See, Memorandum from the Attorney General, “*Measures to Improve the Immigration Courts and the Board of Immigration Appeals*”, (2006), available online at <http://trac.syr.edu/tracatwork/detail/P104.pdf> (last accessed 20/3/17).

⁸⁹ See, American Bar Association, “*Reforming the immigration system: proposals to promote independence, fairness, efficiency, and professionalism in the adjudication of removal cases*”, American Bar Association: Washington, (2010), at 8. This report is also available online at https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/full_report_part3_authcheckdam.pdf (last accessed 25/7/17).

⁹⁰ In February 2002, the then-Attorney General John Ashcroft announced plans to streamline BIA reviews of immigration decisions in order to reduce an increasing backlog of cases. These changes essentially reversed the course set by the previous attempts at streamlining. Prior to the 2002 changes, most appeals to the BIA were reviewed by a three-judge panel, which characteristically issued written opinions. Ashcroft’s changes, however, reversed this course, requiring review by a single BIA member in most cases and instructing an increase in one-sentence summary orders. See, Acer & Hughes, *supra* note 75, at 43; Burkhardt, *supra* note 76.

⁹¹ See, “*Measures to Improve the Immigration Courts and the Board of Immigration Appeals*”, (2006), *supra* note 88, at 4-6.

⁹² See, “*Reforming the immigration system: proposals to promote independence, fairness, efficiency, and professionalism in the adjudication of removal cases*”, *supra* note 89, at 9.

⁹³ BIA, “*Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedent*”, (2008), available online at <http://regulations.justia.com/regulations/fedreg/2008/06/18/E8-13435.html> (last accessed 25/5/17).

affirmances without opinions, expanded the scope of panel reviews and devolved power to designate decisions as precedent to individual panels.⁹⁴

Following the streamlining reforms, concerns have arisen as to whether the BIA is fulfilling its purpose. Some critics have characterised the BIA as performing merely a ‘rubber-stamp’ of immigration judge’s decisions,⁹⁵ having abdicated its responsibility to correct errors of the decision-makers below and craft uniformity to immigration law.⁹⁶ Arguably, ‘rubber-stamping’ is merely a ‘legitimate’ extension of the restrictive measures implemented so as to ensure that refugees do not flux into their boundaries. It further prevents the success of appeals to the federal courts, and makes it more likely, that those involved in immigration proceedings will not benefit from the fair, unbiased, and thoughtful consideration their cases deserve. Ultimately, whilst summary decisions from the BIA may move cases through more quickly, they fail to catch instances of blatant bias or flawed decisions by immigration judges. A number of Circuit Court decisions have also complained about ‘shoddy’ decision-making by immigration judges, and to a lesser extent, by the BIA itself, and have accused the BIA of abdicating its oversight role.⁹⁷ Academics, practitioners and other interested parties have criticised numerous aspects of the BIA’s operation including: the continuing backlog of unresolved appeals at the Board; the prevalence of single-panel reviews; the publication of short, perfunctionary decisions which fail to provide sufficient evidence that the Board considered certain arguments made by claimants; an inadequate volume of precedent decisions; restrictions on the

⁹⁴ See, “*Reforming the immigration system: proposals to promote independence, fairness, efficiency, and professionalism in the adjudication of removal cases*”, *supra* note 89, at 9-10.

⁹⁵ Acer & Hughes, *supra* note 75, at 43. The US Commission on International Religious Freedom studied the impact of the 2002 changes on asylum seekers who were detained upon arrival in the US. *Ibid.* According to the Commission’s findings, the BIA sustained 24% of asylum appeals in such cases in 2001. After the 2002 changes, that number dropped to 2-4%. The commission pointedly concluded that, “statistically, it is highly unlikely that any asylum-seeker denied by the immigration judge will find protection by appealing to the BIA”. *Ibid.* Consequently, the Immigration Courts are some claimants only opportunity to have their claim heard while in the immigration system. The next meaningful opportunity is the federal circuit courts. *Ibid.* See, *Iao v Gonzales*, 400 F.3d 530 (7th Cir. 2005), at 533-35; Burkhardt, *supra* note 76, at 68 (predicting that, “the unprecedented expansion of the use of single-member review...will undermine the quality of administrative adjudication of immigration cases and increase the propensity of judges to allow their ideological predilections to determine the result of those cases”).

⁹⁶ See, Appleseed, “*Assembly Line Injustice – Blueprint to Reform America’s Immigration Court’s*”, (2009), available online at <http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf> (last accessed 20/5/17), at 32.

⁹⁷ See, “*Reforming the immigration system: proposals to promote independence, fairness, efficiency, and professionalism in the adjudication of removal cases*”, *supra* note 89, at 10.

Boards ability to review the factual findings and credibility determinations made by immigration judges de novo; and the issuance of AWO's.⁹⁸ Although the BIA has reduced its use of AWOS,⁹⁹ the absence of an opinion leaves FGM and other refugee claimants who are facing deportation and potential human rights violations within their countries of origin unconvinced that the BIA actually considers their plight and federal appellate jurists without any legal reasoning to review when the affirmance comes before their bench.¹⁰⁰ Moreover, earlier efforts to reduce the size of the BIA and the skyrocketing of appeals from the BIA to the Federal Court of Appeals in the wake of the 2002 reforms led some to suggest that a loss of faith in the BIA's adjudicatory ability was to blame for this expansion.¹⁰¹ Commentators have suggested that changing the BIA's character was the reforms primary goal.¹⁰² Taken together, these changes¹⁰³ undermine, "the ability of asylum seekers to obtain a full and fair hearing on their claims".¹⁰⁴ Arguably, it can be said with certainty that the process before the BIA is procedurally unfair, undermining the quality of administrative adjudication of immigration cases and increasing the propensity of judges to allow their ideological predilections to determine the result of those cases.

⁹⁸ *Ibid*, at 10.

⁹⁹ See, Batará C, "Immigration Appeals: 49 Minutes for Justice, Fairness and Due Process", (2014), available online at

<http://www.bataraimmigrationlaw.com/49-minutes-for-immigration-appeals-justice.html>

(last accessed 26/5/17).

¹⁰⁰ Vaala, *supra* note 75, at 1018.

¹⁰¹ American Bar Association, "Ensuring Fairness and Due Process in Immigration Proceedings", American Bar Association: Washington (2008). This report is also available online at

https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration_authcheckdam.pdf (last accessed 19/5/17). For a more in-depth analysis of these criticisms see, "Reforming the immigration system: proposals to promote independence, fairness, efficiency, and professionalism in the adjudication of removal cases", *supra* note 89, at 10-27.

¹⁰² Durham, *supra* note 85, at 683 (noting that, "following the voluntary retirement of several of the most liberal members of the Board, the five members selected for 'reassignment' by the Attorney-General were those with essentially the most immigrant-friendly and anti-agency decision record). The former INS General Counsel declared that, "until the attorney general discloses his reasons (for letting certain BIA members go), this has all the appearances of a purge of dedicated civil servants based on a perception of their policy views". Burkhardt, *supra* note 76, at 51.

¹⁰³ Other changes not discussed at length here include heightened standard of review for factual findings and credibility determinations, as well as shortened deadlines for disposition of appeals. These will be discussed where necessary throughout the thesis. See, 8 C.F.R. Section 1003.1(e)(8) (2006); Burkhardt, *supra* note 76, at 50-51.

¹⁰⁴ Acer & Hughes, *supra* note 75, at 43. See also, Burkhardt, *supra* note 76, at 41 (arguing that changes to procedures governing BIA proceedings, "make it much more likely that those involved in immigration proceedings will not benefit from the fair, unbiased, and thoughtful consideration their cases deserve").

Moving away from the composition and reforms surrounding the US immigration system, it is also important to note that legal aid is not universally available, though some legal clinics do serve asylum claimants.¹⁰⁵ Claimants are typically responsible for supplying their own interpreters, particularly at the Asylum Office level, who are all too often family members, friends, or a representative of the claimant's community. Consequently, the competence of interpreters may vary accordingly, and in some instances (as discussed in Chapter One) may prove to be detrimental to the claimant's case.¹⁰⁶ The asylum officer conducts an interview and takes notes, which form the only official record of the proceedings. The hearing before the immigration judge will be officially recorded however, as mandated by the Immigration and Nationality Act.¹⁰⁷ Legal representatives may make submissions, but their role is relatively limited. The INS Gender-Guidelines apply explicitly to asylum officers and not Immigration Judges. The BIA and Immigration judges are not formally subject to the Guidelines, although they may choose to be guided by them. Like the CIRB Gender-Guidelines, the INS Gender-Guidelines do not apply to the overseas selection process.¹⁰⁸

¹⁰⁵ See, Thompson N, "Due Process Problems Caused by Large Disparities in Grants of Asylum: Will New Department of Justice Recommendations Solve the Problem?", 22 Emory International Law Review 385, (2008), at 406 (discussing the impact of single-member BIA panels). See also, Macklin, *supra* note 2, at 31. See also, Dastyari A, "United States Migrant Interdiction and the Detention of Refugees in Guantanamo Bay", Cambridge University Press: New York, (2015), at 163 (discussing the impact of having legal representation at immigration hearings). See further, Houseman A, "Civil Legal Aid in the United States – An Update for 2015: A Report for the International Legal Aid Group", Consortium for the National Equal Justice Library, (2015), available online at https://repository.library.georgetown.edu/bitstream/handle/10822/761858/%20Houseman_Civil_Legal_Aid_US_2015.pdf?sequence=1 (last accessed 28/5/17).

¹⁰⁶ Macklin, *supra* note 2, at 31. Whilst, claimants are responsible for providing their own interpreters at the Asylum Office level, at the Immigration Court level, interpreters are provided by the court for free. Information supplied by Lisa Frydman, Managing Attorney for the Centre for Gender and Refugee Studies (on file with the author).

¹⁰⁷ Immigration and Nationality Act, Section 101(a) (42), 8 USC Section 240 (b)(4)(c), which provides that, "a complete record shall be kept of all testimony and evidence produced at the proceedings". The act is available online via the US Citizenship and Immigration Services homepage at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD> (last accessed 29/4/17). (Hereafter referred to as the INA Act). For a more detailed commentary on the recording of hearings before immigration judges in the US, see specifically, US Department of Justice, "Memorandum: Procedures for Going-Off Record During Proceedings" (2003), available online at <http://www.usdoj.gov/eoir/efoia/ocij/oppm03/03-06.pdf> (last accessed 28/2/16).

¹⁰⁸ Macklin, *supra* note 2, at 32. It should be noted, however, that while the INS Gender-Guidelines do not apply to overseas applicants, in 2000 the US Department of State issued Gender Guidelines for Overseas Refugee Processing. These guidelines aim to be consistent with the guidance issued by the INS in their 1995 Gender Guidelines.

3. UK

The hierarchy and structure of the court system with the UK can be considered as consisting of five levels: (1) the Supreme Court (formerly known as the UKHL) and the Judicial Committee of the Privy Council;¹⁰⁹ (2) the Court of Appeal;¹¹⁰ (3) the High Court;¹¹¹ (4) the Crown and County Courts;¹¹² and (5) the Magistrates Courts and the

¹⁰⁹ The Judicial Committee of the Privy Council is the court of final appeal for Commonwealth countries that have retained appeals to either Her Majesty in Council or to the Judicial Committee. It is also the court of final appeal for the High Court of Justiciary in Scotland for issues related to devolution. Some functions of the Judicial Committee were taken over by the new Supreme Court in 2009. In 2009 the Supreme Court replaced the UKHL as the Highest Court in England, Wales and Northern Ireland. As with the UKHL, the Supreme Court hears appeals from the Court of Appeal and the High Court (only in exceptional circumstances). It also hears appeals from the Inner House of the Court of Session in Scotland. Appeals are normally heard by five justices (formerly Lords of Appeal in ordinary, or Law Lords), but there can be as many as nine.

¹¹⁰ The Court of Appeal consists of 2 divisions, the Criminal Division and the Civil Division. Decisions of the Court of Appeal may be appealed to the Supreme Court. The Civil Division of the Court of Appeal hears appeals concerning civil law and family justice from the High Court, from Tribunals, and certain cases from the County Courts. The Criminal Division of the Court of Appeal hears appeals from the Crown Court.

¹¹¹ The High Court consists of three divisions, the Chancery Division, the Family Division and the Queen's Bench Division. Decisions of the High Court may be appealed to the Civil Division of the Court of Appeal. (1) The Companies Court of the Chancery Divisions deals with cases concerning commercial fraud, business disputes, insolvency, company management, and disqualification of directors. (2) The Divisional Court of the Chancery Division deals with cases concerning equity, trusts, contentious probate, tax partnerships, bankruptcy and land. (3) The Patents Court of the Chancery Division deals with cases concerning intellectual property, copyright, patents and trademarks, including passing off. (4) The Divisional Court of the Family Division deals with all matrimonial matters, including custody of children, parentage, adoption, family homes, domestic violence, separation, annulment, divorce and medical treatment declarations, and with uncontested probate matters. (5) The Administrative Court of the Queen's Bench Division hears judicial reviews, statutory appeals and application, application for *habeas corpus*, and applications under the Drug Trafficking Act 1984 and the Criminal Justice Act 1988. It also oversees the legality of decisions and actions of inferior courts and tribunals, local authorities, Ministers of the Crown, and other public bodies and officials. (6) The Admiralty Court of the Queen's Bench Division deals with shipping and maritime disputes, including collisions, salvage, carriage of cargo, limitation, and mortgage disputes. The Court can arrest vessels and cargoes and sell them within the jurisdiction of England and Wales. (7) The Commercial Court of the Queens Bench Division deals with cases arising from national and international business disputes, including international trade, banking, commodities, and arbitration disputes. (8) The Mercantile Court of the Queens Bench Division deals with national and international business disputes that involve claims of lesser value and complexity than those heard by the Commercial Court. (9) The Technology and Construction Court of the Queens Bench Division is a speciality court that deals primarily with technology and construction disputes that involve issues or questions, which are technically complex, and with cases where a trial by a specialist judge is required.

¹¹² The Crown Courts deal with indictable criminal cases that have been transferred from the Magistrates Courts, including hearing of serious criminal cases (i.e. murder), cases sent for sentencing, and appeals. Cases are heard by a judge and jury. Decisions of the Crown Court may be appealed to the Criminal Division of the Court of Appeal. The County Courts deal with all except the most complicated and the most simple civil cases (including most matters under £5000), such as claims for the repayment of debts, breach of contract, personal injury, family and housing issues, and the enforcement of previous County Court judgements. Cases are heard by a judge, without a jury and decisions may be appealed to the appropriate division of the High Court.

Tribunals Service, which deals with matters pertaining to asylum and immigration among other issues.¹¹³ Decisions of the Supreme Court are binding on all courts below it and the Supreme Court is bound by no other court, other than by the European Court of Justice on matters of European Community Law only. Though considering the 2016 Brexit referendum decision, this will eventually result in a revised hierarchy. Nonetheless, under the current system the Court of Appeal is bound by the Supreme Court but its decisions are binding on all courts below it. Below the Court of Appeal, only the divisional courts and the High Court create precedent. Inferior courts and tribunals do not create precedent but must abide by the precedents set in higher courts.¹¹⁴

Individuals and families can apply for asylum at their point of entry into the UK, or directly to the Asylum Screening Unit within the Home Office's Border Agency.¹¹⁵ Since March 2007 all new asylum claims are considered under the 'New Asylum Model',¹¹⁶ introduced by way of the UK governments five-year plan in February 2005. The aim of the NAM was to introduce a faster, more tightly managed asylum process with an emphasis on rapid integration or removal.¹¹⁷ As soon as UKBA receives a claim, it conducts a screening interview with the applicant to establish their identity and collect basic personal information. A far more detailed interview with a UKBA case-owner takes

¹¹³ The Magistrates' Courts deal with summary criminal cases and committals to the Crown Court, with simple civil cases including family proceedings courts and youth courts, and with licensing of betting, gaming and liquor. Cases are normally heard by either a panel of 3 magistrates or by a District Judge, without a jury. Criminal decisions of the Magistrates' Courts may be appealed to the Crown Court. Civil decisions may be appealed to the County Courts. The Tribunal's Service makes decisions on matters including asylum, immigration, criminal injuries compensation, social security, education, employment, child support, pensions, tax and lands. Decisions of the Tribunals Service may be appealed to the appropriate Division of the High Court.

¹¹⁴ For an overview of the UK Court Structure please refer to the JustCite: The Good Law Guide website at <http://new.justcite.com/kb/editorial-policies/terms/uk-court-structure/> (last accessed 25/7/17).

¹¹⁵ Formally known as the Immigration and Nationality Directorate and the Border and Immigration Agency. The Asylum Screening Unit offices are situated in Croydon and Liverpool. See, Refugee Council, "Asylum Process: Support Pack for Advisors", (2007), at 3. This document is available online at http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/practice/advice_guides/AsylumProcess_Apr07.pdf (last accessed 18/11/16).

¹¹⁶ Hereafter referred to as the NAM.

¹¹⁷ In this model, the first interview is a screening interview which does not deal with the substance of the claim, but determines which route the claim is to follow. The NAM involves five routes, or 'segments' which determine: the speed at which the claim is processed; how the asylum seeker can obtain legal advice; the type of accommodation where they are required to live; how and where they are to remain in contact with the Border Agency; and whether they are subject to electronic monitoring. See, Clayton G, "Textbook on Immigration and Asylum Law", Oxford University Press: Oxford, (2009), at 414. For a comprehensive discussion of the refugee determination system in the UK and the NAM, including the 'Fast-Track procedures' which is beyond the scope of this thesis, see chapter 12 specifically.

place a few weeks later. This second interview usually lasts for several hours and follows a rigid question and answer format. The case-owner focuses here on establishing the basic chronology of the applicant's narrative and on testing its internal credibility. At both interviews interpreters hired by UKBA are present.¹¹⁸ After the interview, the case-owner must decide whether the asylum claim should be granted or refused. In the former case, the applicant is granted refugee status or another form of international protection, and notified of this decision without any specific reasons being given. More frequently, however, the claim is refused and the case-owner writes a Reasons for Refusal Letter (RFRL) explaining and justifying this decision.¹¹⁹

If the claimant is refused asylum they may have the right to appeal. In 2010, Immigration and Asylum Chambers were established in both tiers of the Unified Tribunals framework created by the Tribunals, Courts and Enforcement Act 2007, replacing the Asylum and Immigration Tribunal.¹²⁰ The First-tier Tribunal (Immigration and Asylum Chamber) is in effect an independent Tribunal dealing with appeals against decisions made by the Home Secretary and his officials in immigration, asylum and nationality

¹¹⁸ See, Good, A, "*Tales of suffering: Asylum narratives in the refugee status determination process*", 68 West Coast Line 80, (2011) at 80–89; Good, A, "*Witness statements and credibility assessments in the British asylum courts*", (2011), in Holden L (ed.), "*Cultural expertise and litigation: Patterns, conflicts, narratives*", London: Routledge, (2011), at 94–122, See also, Gibb R & Good A, "*Interpretation, translation and intercultural communication in refugee status determination procedures in the UK and France*", 14 Language and Intercultural Communication 385, (2014), at 385–99.

¹¹⁹ See, Gibb & Gold, *supra* note 118 (noting that most RFRLs claim that the applicant's story lacks credibility as a result of alleged inconsistencies in their answers or on the grounds that aspects of their narrative are inconsistent with the cited COI or because their story is deemed inherently unlikely).

¹²⁰ The Asylum and Immigration Tribunal was the successor to the Immigration Appellate Authority (IAA). The IAA was an independent judicial body in the UK constituted under the Immigration Act of 1971. It consisted of two tiers: immigration adjudicators and the Immigration Appeal Tribunal (IAT). The AIT was set up under the Asylum and Immigration (Treatment of Claimants etc) Act 2004 and came into being on 4 April 2005. It effectively abolished the two-tier structure and created a single tier tribunal. The purpose of the tribunal was to hear and decide appeals against decisions made by the Home Office in matters of asylum, immigration and nationality. Applicants may appeal on the grounds of: (1) race discrimination; or (2) human rights, if the decision is against their rights under the European Convention in Human Rights or if it would be against an applicant's rights for the UK to remove them because of that decision. See, UK Border Agency, "*Asylum*", (2009), available online at <http://www.ukba.homeoffice.gov.uk/asylum/> (last accessed 17/7/17). See, Section, *When do I have a right to appeal?* Other grounds upon which an appeal may be made include: (1) if the decision was not in line with immigration rules; (2) if the decision was not in line with the law; or (3) if the immigration rules allowed the individual who made the decision to exercise his/her own judgment on the circumstances of the case and his/her judgment should have been exercised differently. *Ibid.* From this time, appeals have been sent to the Immigration and Asylum Chamber of the First-tier Tribunal. Onward appeal rights are to a separate Immigration and Asylum Chamber of the Upper Tribunal with permission. Onward appeals from the Upper Tribunal are to the Court of Appeal, Inner House of Court of Session in Scotland, and Court of Appeal in Northern Ireland, with permission.

matters. The main types of appeal which the tribunal will deal with concern decisions to: refuse a person asylum in the UK; refuse a person entry to, or leave to remain in the UK; and decisions to deport someone already in the UK.¹²¹ Appeals are heard by one or more Immigration Judges who are sometimes accompanied by non-legal members of the Tribunal. These judges and non-legal members are appointed by the Lord Chancellor and together form an independent judicial body.¹²² Claimants are usually accompanied by a legal representative, and the UK Border Agency will also have a legal representative at the hearing. Once a decision has been made the claimant will usually receive the decision in writing. In certain circumstances claimants, may be able to apply to have the Tribunals decision reconsidered. The UK Border Agency may also be able to ask to have it reconsidered.

If a claimant believes that the first-tier tribunal made an error of law, they can apply for permission to appeal to the Upper Tribunal.¹²³ If the First-tier Tribunal does not grant permission, a second application can then be made to the Upper Tribunal. If permission to appeal is granted by either the First-tier Tribunal or the Upper Tribunal, the Upper Tribunal will then hold a substantive hearing to determine whether an error of law was made and may set aside the decision of the First-tier Tribunal, and either remake the decision, or remit the case to the First-tier Tribunal with directions for its reconsideration.¹²⁴ Decisions of the Upper Tribunal are binding on the tribunals and public authorities below.¹²⁵ Under this new system, there also exists an onward right to appeal to the Court of Appeal, and then to the Supreme Court if appropriate.

The RDP in the UK is relatively informal with both UK Border Agency case-workers working alone, and immigration judges, either sitting alone or working together as part of

¹²¹ *Ibid.*

¹²² *Ibid.* See also, Clayton, *supra* note 117, at 255-6 (discussing the composition of the AIT).

¹²³ The main functions of the newly established Upper Tribunals, including the Upper Tribunal (Immigration and Asylum Chamber) include: (1) To take over hearing appeals to the courts, and similar bodies from the decisions of local tribunals; (2) To decide certain cases that do not go through the First-tier Tribunal; (3) To exercise powers of judicial review in certain circumstances and; (4) To deal with enforcement of decisions, directions and orders made by tribunals. See, Tribunals Service, “*Upper Tribunal*”, (2010), available online via the Tribunal Service Website at <http://www.tribunals.gov.uk/Tribunals/upper/upper.htm> (last accessed 25/7/17).

¹²⁴ Tribunals Service, “*Immigration Appeals Response to Consultation: Fair Decisions; Faster Justice*”, *supra* note 120, at 8.

¹²⁵ See, Tribunals Service, “*Upper Tribunal*”, *supra* note 123.

a two or three-member panel. Both rely much more on written submissions and evidence than on oral procedure when making their determinations.¹²⁶ Both the UK Border Agency and the Immigration and Asylum Chambers provide claimants with an interpreter if requested.¹²⁷ However, it should be noted that, only the interpreters that the Tribunal provides can take part in the appeals hearing. In exceptional cases, however, the claimant's representatives can instruct an independent interpreter although it may be difficult to fund this.¹²⁸

As previously discussed, with the establishment of the IAT, the UK gender-guidelines were effectively withdrawn. Presently, UK immigrant judges in theory currently have no existing guidelines on gender tailored to asylum claims in which to base their knowledge, application of law and decision-making. However, this is not to say that the IAA UK gender-guidelines cannot be consulted by immigration judges if they so wish.¹²⁹ Whilst,

¹²⁶ See, Save the Children, “*Child, Asylum and Refugee Issues in Scotland: The Adjudicator/Immigration Judge*” available online at http://www.savethechildren.org.uk/caris/legal/asylumproc/ap_p2_22.php (last accessed 28/2/15).

¹²⁷ See, Tribunals Service: Immigration and Asylum, available online at <http://www.tribunals.gov.uk/ImmigrationAsylum/FAQs/FAQ9.htm> (last accessed 19/2/16) (stating that an interpreter will be provided free of charge and that, “You can bring your own interpreter, but they will not be allowed to speak to the Tribunal or interpret the proceedings for you. This is because the interpreters we use are from a panel of interpreters, they are impartial and have shown they have skills which have been independently assessed”). In relation to the UK Border Agency policy on interpreters see, Home Office UK Border Agency, “*Central Interpreter’s Unit: Code of Conduct for UK Border Agency Registered Interpreters*”, (2008), available online at <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/relateddocuments/Theasyluminterview/conductingtheasyluminterview2.pdf?view=Binary> (last accessed 25/7/17).

¹²⁸ “*Child, Asylum and Refugee Issues in Scotland: The Adjudicator/Immigration Judge*”, *supra* note 126. With the issue of funding in mind, it is important to note that whilst legal aid is available for immigration and asylum appeal it has been reported by some that legal aid, within the UK immigration and asylum system, is not usually available for representation at appeal hearings, but is available during the application stage, and for assistance prior to and after the hearing. See, The Guardian, “*Immigration: Appeals*” (2001), available online at <http://www.guardian.co.uk/politics/2001/jul/19/mpsurgery18> (last accessed 25/7/17). See also, Ceneda S & Palmer C, “*Lip Service or Implementation? The Home Office Gender Guidance and Women’s Asylum Claims in the UK*”, Asylum Aid: London (2006), at Section Eleven (discussing the obstacle of poor legal advisors in gender-based asylum claims as a result of the UK legal aid cuts introduced in 2004). For further information on legal aid in immigration cases in the UK please refer to the Immigration Advice Service Website at <https://iaservices.org.uk/legal-aid/> (last accessed 20/7/17).

¹²⁹ UK Gender Guidelines, *supra* note 8, Section 1.8 (noting that the gender-guidelines aim to provide the judiciary of the IAA with the tools to enable them to fully and effectively consider and decide asylum claims). See also Bennett, *supra* note 8, at 11. Similarly, it should also be noted that the Asylum Policy Instructions, including policy on gender issues in the asylum claim, implemented by the Home Office are to be followed by asylum case owners in the UK Border Agency. See, Asylum Policy Instructions, available online via the Home Office UK Border Agency website at <https://www.gov.uk/topic/immigration-operational-guidance/asylum-policy/latest> (last accessed 15/7/17).

the position of the UK gender-guidelines is uncertain, asylum case owners in the UK Border Agency, however, under the NAM are advised to consider the UK Border Agency's asylum policy instructions. Like its North American counterparts, the UK Gender-Guidelines only apply to inland claims, since it is not legally possible to apply for asylum from outside the UK.¹³⁰

As this short review indicates, the US, Canada, and the UK share several similar procedural features, but differ in important ways regarding the scope of their respective guidelines and the RDP. Before examining these differences in the next section, a preliminary point in relation to the examined decision-making bodies needs to be made. Whilst institutional safeguards are in place within each of the case-studies, insofar as independent tribunals exist and the right to appeal exists to an appellate authority, as does the remedy of judicial review, arguably, these safeguards are undermined by fast-track and expedited removal proceedings. Such policies, give unprecedented authority to decision-makers to issue removal orders that are often unreviewable, thus undermining the principle of due process and ultimately dismissing procedural safeguards. Whilst research in respect of the treatment of FGM claims has not uncovered any such expedited cases, and expedited removal proceedings are not a focal point of this thesis, these restrictive policies and their influence have arguably undermined the very fabric of RDP's with decision-makers now considering speed to be the primary desideratum in the RDP, to the detriment of claimants. In this regard, speed, must be balanced against the need for procedural justice.¹³¹ Expedited and fast-track procedures may jeopardize some valid asylum claims by rushing claimants through a process that lacks adequate procedural protections. The push for stricter immigration legislation results, arguably, not from legitimate policy concerns, but rather from the fear that terrorists and economic migrants will use asylum as a means of entering Western States.¹³² U.S. President Donald Trump's controversial immigration orders are prime examples.¹³³ In January 2017, he banned

¹³⁰ See, Asylum Aid, "The Asylum Process Made Simple" (2017), available online at <http://www.asylumaid.org.uk/the-asylum-process-made-simple/> (last accessed 25/7/17).

¹³¹ Harvey C, "Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy", in Nicholson F & Twomey P (ed), "Current Issues in UK Asylum Law and Policy", Imprint: Ashgate, (1998), at 21.

¹³² Thompson, *supra* note 105, at 405. See also, Fears B, "Bill Shifts Burden to Asylum Seekers", Washington Post, May 1st 2005, at A4.

¹³³ See, Executive Order: Protecting the Nation from Foreign Terrorist Entry Into the United States

travel from seven Muslim-majority countries to the US for 90 days.¹³⁴ He also suspended refugee admissions for 120 days. After the first travel ban was blocked by the courts, Trump unveiled a new ban on 6th March. This ban, too, was blocked by the courts¹³⁵ and has been described as dripping with, “religious intolerance, animus, and discrimination”.¹³⁶ Genuine FGM claimants must not be penalised because of political fears. Considering the numerous challenges claimants must face when attempting to obtain refugee protection, each decision-maker must apply refugee laws, guidelines and standards fairly by considering each claimant’s situation without being hasty, capricious, or biased.

II. Evidentiary and Procedural Issues

Evidentiary issues invoke the evaluation of credibility, and the use of factual documentary sources. Procedural issues on the other hand, define the conduct of refugee-determination hearings, including the personnel present at the hearing/interview and how those individuals conduct themselves and the proceedings. All of the gender-guidelines under consideration in this thesis include provisions relating to procedural questions or problems and evidentiary considerations that are particular to women’s claims. As will be highlighted in due course, they all advise decision-makers to be sensitive to the wide spectrum of cultural, religious and other personal reasons why female claimants might experience humiliation, pain, trauma, or shame in recounting certain incidents, particularly those of a sexual nature.¹³⁷

(2017), available online via the White House: Office of the Press Secretary at <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> (last accessed 29/5/17).

¹³⁴ Guardian Panel, “A rollercoaster ride’: how Trump’s Muslim travel ban has affected lives”, 24th May 2017, available online at <https://www.theguardian.com/commentisfree/2017/may/24/how-trumps-muslim-travel-ban-affects-us-panel> (last accessed 25/5/17).

¹³⁵ See, Executive Order, *supra* note 133. See also, Valverde M, “4th Circuit Court of Appeals Upholds Block on Trump Travel Ban”, (2017), available online at <http://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1402/suspend-immigration-terror-prone-places/> (last accessed 30/5/17).

¹³⁶ *Ibid.*

¹³⁷ Macklin, *supra* note 2 at 35. See also, Luopajarvi K, “Gender-Related Persecution as Basis for Refugee Status: Comparative Perspectives” Abo Akademi University, Finland, Institute of Human Rights Research Report No 19, (2003), at 38.

Until 2006, the CIRB gender-guidelines whilst encouraging decision-makers to familiarise themselves with the UNHCR Guidelines on the Protection of Refugee Women, which provide a few practical suggestions on how to conduct interviews in a gender-sensitive manner¹³⁸ were relatively weak in respect of procedural and evidentiary issues. They failed to refer to the UNHCR Executive Committee's 1995 publication, *Sexual Violence against Refugees: Guidelines on Prevention and Response*,¹³⁹ which contains a more extensive discussion and provides additional guidance regarding interviews of women who have been subjected to sexual violence. They also failed to focus on the actual conduct of decision-makers in the hearing rooms.¹⁴⁰ However in 2006, the IRB released Guideline 8: Procedures with Respect to Vulnerable Persons Appearing before the IRB, which proposes best practices and procedural accommodations for particularly vulnerable claimants appearing before the IRB, including children, women subjected to gender-based forms of violence, and survivors of torture.¹⁴¹ This guideline arguably brings the CIRB gender-guidelines in line with its UK and US counterparts, which equally devote significant attention to this topic. Specifically, Guideline 8 emphasises the importance of accommodating women and making the proceedings as fair as possible, so as to ensure that women are not unfairly disadvantaged as a result of their experiences.¹⁴² As such, it ensures the, "on-going sensitization of members and other hearing room participants to the impact of severe vulnerability".¹⁴³ In addressing the gender-based claims of women, Guideline 8 explicitly states that, the CIRB Gender-Guidelines will be considered in all cases based on gender.¹⁴⁴

¹³⁸ Office of the United Nations High Commissioner for Refugees, "*Guidelines on the Protection of Refugee Women*", U.N. Doc. ES/SCP/67 (1991). (Hereafter referred to as *Guidelines on the Protection of Refugee Women*), para 72. For instance, the UNHCR Guidelines advise against questioning in detail about sexual abuse, since what matters is simply that it occurred. *Ibid.* Audrey Macklin, notes that in her experience as a member of the IRB, the UNHCR Guidelines were not actually distributed to members. Macklin, *supra* note 2, at 35.

¹³⁹ UNHCR, "*Sexual Violence Against Refugees: Guidelines on Prevention and Response (Extracts)*", 7 International Journal of Refugee Law 720, (1996).

¹⁴⁰ Prior to 1996, this particular topic was left to member training sessions.

¹⁴¹ See, *Guideline 8, supra* note 3. Section 2.1 of Guideline 8 defines a vulnerable person as:

"individuals whose ability to present their cases before the IRB is severely impaired. Such persons, may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, and women who have suffered gender-related persecution".

¹⁴² *Ibid.*, section 2.3. & 5.1.

¹⁴³ *Ibid.*, section 3.4.

¹⁴⁴ *Ibid.*, section 14.1.

Like its Canadian counterpart, the INS gender-guidelines equally emphasise the importance of creating a ‘customer-friendly’ asylum interview environment, which allows female claimants to discuss freely the elements and details of their claims.¹⁴⁵ As such they call on asylum officers to remain aware of the fact that most claimants come from countries where they have good reason to distrust those in authority.¹⁴⁶ Asylum officers are, therefore, encouraged to create a rapport with the claimant, move gradually into sensitive areas of questioning, and confine questioning about sexual violence to confirming whether it happened and the motives of the perpetrator.¹⁴⁷ Like the CIRB gender-guidelines, the INS gender-guidelines also allude to the possibility that the claimant may be traumatized.¹⁴⁸ The INS gender-guidelines, however, further describe how this may affect the claimant’s testimony and lead to erroneous negative inferences concerning her credibility.¹⁴⁹ Similar comments are made about culturally specific body language.¹⁵⁰

The UK gender-guidelines, also discuss the interview process, but go considerably further than their American or Canadian counterparts in focusing as much on what the decision-maker can do to diminish a claimant’s distress, as with the reasons why the claimant may be distressed or uncomfortable. These guidelines discuss arranging the physical environment to ease the discomfort of claimants and promote confidentiality, the importance of establishing a rapport with the claimant, and culturally sensitive communication techniques.¹⁵¹ They also contain practical advice about the decision-

¹⁴⁵ INS Gender Guidelines, *supra* note 5, at 4.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, at 6.

¹⁴⁸ *Ibid.*, at 7. *See also*, CIRB gender-guidelines, *supra* note 3, Section D.3 & Guideline 8, *supra* note 3, section 2.3.

¹⁴⁹ INS Gender Guidelines, *supra* note 5, at 6-7.

¹⁵⁰ *Ibid.*, at 7

¹⁵¹ UK Gender Guidelines, *supra* note 8, Section 5 (*generally*). Unfortunately, the Home Office Gender Asylum Instruction is not as comprehensive as the 2000 guidelines and do not discuss arranging the physical environment to ease the discomfort of claimants and promote confidentiality, the importance of establishing a rapport with the claimant, and culturally sensitive communication techniques. Nor does the instruction refer to practical advice about the decision-makers body language and listening skills to minimize intimidation and reassure the claimant that she is in a safe environment, where she can speak freely. It should be noted, however, that this Gender Asylum Instruction does note that in respect of conducting interviews, decision-makers should be aware that victims of sexual violence may suffer trauma and that this trauma may affect the how a woman responds during interview. No further practical advice is given, except for a statement to the effect that further guidance may be obtained from the Home Offices Asylum Policy Instruction on Conducting the Asylum Interview. *See, Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 18. Section 15: Interviews Requiring Particular Care of the Asylum Policy

makers body language and listening skills to minimize intimidation and reassure the claimant that she is in a safe environment, where she can speak freely.¹⁵²

The demeanour/behaviour of decision-makers during hearings can have a profound impact on the willingness of claimants to divulge pertinent evidence and the quality of evidence disclosed.¹⁵³ Regrettably, not all decision-makers approach their duties with the appropriate degree of respect and sensitivity required in such cases. For instance in *Yusuf v Canada*,¹⁵⁴ the Federal Court of Appeal remarked that the Panel's, "sexist, unwarranted, and highly irrelevant observations by a member of the Refugee Division was capable of giving the impression that their originator was biased"¹⁵⁵ and ordered that the claimant receive another hearing before a different IRB panel.¹⁵⁶ This case reinforces the concern and reality that, while the guidelines provide for a gender-sensitive RDP, and there is the possibility of appeal, decisions-makers may bring their own preconceptions and biases to the proceedings and female claimants may be unfairly disadvantaged. Ultimately whilst this assertion holds true for all types of cases, it is asserted that such bias may be even more prevalent in refugee cases where decision-makers may be untrained, unqualified and easily influenced by political considerations.

The CIRB gender-guidelines do not address the issue of whether or not gender-based claims should be conducted with all-female personnel (including interpreters).¹⁵⁷ Within the Canadian context, some counsel representing female claimants before the IRB have

Instruction on Conducting the Asylum Interview makes provision for same-sex interpreters and interviewing officers; conducting of hearings in foreign languages; and also, addresses steps to be taken in instances of illness, financial difficulties, child-care provisions, Transport, Weather and religious festivals disruptions and the lack of interpreters or rooms among others.

¹⁵² See, UK Gender Guidelines, *supra* note 8, sections 5.23-5.25 (discussing effective communication) & The Asylum Policy Instruction: *Gender Issues in the Asylum Claim*, *supra* note 8, at 17-18 (in my own personal opinion the 2010 gender policy instruction does not elaborate on or provide as much practical guidance as that outlined in the UK Gender Guidelines). With admirable candour, the UK Gender Guidelines acknowledge that: "Even where the interviewer and the interviewing environment have been supportive of an asylum seeker and good practice has been followed, the interview process itself will impact on the manner in which an asylum seeker gives her testimony and the information which she reveals". See, UK Gender Guidelines, *supra* note 8, Section 5.19.

¹⁵³ Macklin, *supra* note 2, at 36.

¹⁵⁴ *Yusuf v Canada*, (1992) F.C. 629.

¹⁵⁵ *Ibid*, at 637-8.

¹⁵⁶ *Ibid* at 638.

¹⁵⁷ CIRB Gender-Guidelines, *supra* note 3, Section D.3. ("In some cases, it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women").

requested all-female panels, with the assistance of a female refugee hearing officer and a female interpreter, in the hope that this will reduce the claimant's uncommunicativeness and enable her to disclose the full nature of her claim.¹⁵⁸ According to former IRB member Audrey Macklin, no consistent policy exists with respect to acceding to these requests, and they are generally dealt with on an *ad hoc* basis in the various regions of the IRB.¹⁵⁹ She states that in her experience, opinion was divided at the IRB regarding a policy of assigning exclusively female personnel to hear claims involving gender-related persecution. Some members she remarks objected because they believed that it would foster the perception that male members of Refugee Hearing Officers were inherently less competent and sensitive in dealing with gender-related claims than their female counterparts.¹⁶⁰ Others expressed concern about the burden placed on female personnel in dealing with gender-related claims, since they may be particularly draining and demanding.¹⁶¹ The CIRB gender-guidelines remain silent on the question, leaving accommodation of requests for all female personnel to the exercise of decision-maker's discretion.¹⁶²

Both the INS and UK gender-guidelines take a more forceful approach, and encourage assigning female officers to cases of a traumatic or sensitive nature.¹⁶³ They explicitly recognise that women may be justifiably inhibited about disclosing details of a sexual nature to men.¹⁶⁴ More specifically, they also acknowledge the reluctance to speak

¹⁵⁸ Macklin, *supra* note 2, at 37.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* In, CRDD T97-06447 *et al.*, October 22, 1999, it was determined that, "all Members are presumed to be competent to carry out their professional obligations in the context of gender-related claims".

¹⁶³ INS Gender Guidelines, *supra* note 5, at 5. *See also*, UK Gender Guidelines, *supra* note 8, section 5.32. In a similar vein to the UK Gender Guidelines, the Home Office Asylum Policy Instruction also states that, "Each applicant will have been asked at screening to indicate a preference for a male or female interviewer, and it should normally be possible to comply with a request for a male or female interviewer or interpreter that is made in advance of an interview. Requests made on the day of an interview for a male or female interviewer or interpreter should be met as far as is operationally possible". *See, Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 17. The European Union Minimum Guarantee on Asylum Procedures, para 28 also states that, "Member States must endeavour to involve skilled female employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin", as cited in the UK Gender Guidelines, *supra* note 8, section 5.32.

¹⁶⁴ INS Gender Guidelines, *supra* note 5, at 5. *See also*, UK Gender Guidelines, *supra* note 8, section 5.30 & 5.31. The UK *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, whilst acknowledging that,

through a male interpreter.¹⁶⁵ According to some academics, the phenomenon of ‘blaming the victim’ of gender-based violence is universal, and a claimant may justifiably fear negative consequences for divulging certain facts in front of a decision-maker, male or female, who may not only stigmatize her, but also violate her confidentiality.¹⁶⁶ Only the UK gender-guidelines highlight the importance of reassuring the claimant about the confidential nature of the interview/hearing process.¹⁶⁷

As noted earlier, a claimant in the US is largely responsible for providing their own interpreter at the Asylum Office level, unlike Canada and the UK who tend to provide interpreters at all stages of the claim. This can severely disadvantage women and result in negative determinations. The interpreter that the claimant may bring may be the only person she knows who can or will interpret for her, and not necessarily someone whom she would usually trust. If the interpreter is a friend or family member from the same cultural community as the claimant, her reluctance to disclose certain facts may be intensified.¹⁶⁸ Whilst, the INS and UK gender-guidelines acknowledge this limitation, they offer no constructive alternative to proceeding with whomever the claimant has brought. In fact, the INS guidelines explicitly state that, “interviews should not generally be cancelled and rescheduled because women with gender-based asylum claims have brought male interpreters”.¹⁶⁹

Victims of sexual abuse may not feel comfortable recounting their experiences in front of relatives, do not explicitly acknowledge that such victims may equally be inhibited about disclosing details of a sexual nature to men or male interpreters. UK *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 17.

¹⁶⁵ UK Gender Guidelines, *supra* note 8, section 5.31. *See also*, INS Gender Guidelines, *supra* note 5, at 5.

¹⁶⁶ Macklin, *supra* note 2, at 37.

¹⁶⁷ *See*, UK Gender Guidelines, *supra* note 8, Section 5.12 & 5.20. Similar provisions are not apparent in the *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8.

¹⁶⁸ *See*, Macklin, *supra* note 2, at 37. Within some societies, family members may alienate victims of sexual violence, viewing such violence as the woman’s fault for failing to preserve her virginity or marital dignity. *See also*, Saso, *supra* note 30, at 274; INS Gender Guidelines, *supra* note 5, at 5-6; UK Gender Guidelines, *supra* note 8, Section 5.26 - 5.28. The Home Office Asylum Policy Instruction also notes that, victims of sexual abuse may not feel comfortable recounting their experiences in front of relatives, who may not know, and especially their own children who, frequently, will not have been told about allegations. Applicants should be interviewed by themselves, especially in cases where a claim of sexual abuse has been made or it is considered to be a possibility. All applicants are advised in their letter of invitation not to bring their children to the interview but to make alternative arrangements. If their children do attend the interview, childcare facilities may be provided. *See*, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 17.

¹⁶⁹ INS Gender Guidelines, *supra* note 5, at 5.

III. Interpretation of the 1951 Refugee Convention Definition

Whilst the case-studies all employ the same refugee definition, variations in interpretation have emerged throughout the years. The general approach to the refugee definition taken in each of the respective jurisprudences forms the background against which their gender directives were drafted, constraining certain interpretive moves and enhancing others.¹⁷⁰

The Refugee Convention definition upon which claims are made can be broken down into the following components: (1) Does the claimant have a well-founded fear of persecution; (2) for reasons of an enumerated persecution ground; and (3) are they unable or unwilling to avail themselves of the protection of that country. Although the gender-guidelines under consideration are organised differently, both the INS and UK guidelines tend to follow the above questions. This approach thus reminds decision-makers that a gender-sensitive interpretation of the refugee definition does not require a departure from or exception to, the general principles, which apply to all refugee claims.¹⁷¹ This message, Macklin argues, is of the utmost importance, because critics of the guidelines may be inclined to dismiss them, “as some form of ‘special treatment’ for women that represent a capitulation to external political pressure, rather than a sensible and legitimate application of existing principles”.¹⁷² In comparison to the UK and INS guidelines, the CIRB gender-guidelines commence with a series of questions, which randomly incorporate various elements of the refugee definition.¹⁷³ Whilst the effect of these questions is to cover the necessary elements of the refugee definition, this approach gives the appearance of a separate scheme for determining refugee status. As such, Macklin has asserted that this approach is both confusing to the decision-maker, and strategically imprudent, in as much as it fosters the erroneous impression that a different more lenient standard applies to gender-related claims.¹⁷⁴

¹⁷⁰ Macklin, *supra* note 2, at 38.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ CIRB Gender Guidelines, *supra* note 3, at the Update. *See also*, Macklin, *supra* note 2, at 38.

¹⁷⁴ Macklin, *supra* note 2, at 38-9. There is some attempt to dispel this notion at the end of the CIRB gender-guidelines, where the drafters set out a ‘Framework of Analysis’ which relates the initial series of questions to the elements of the refugee definition. *Ibid.* *See also*, CIRB Gender Guidelines, *supra* note 3.

A. Persecution

The UK, INS and CIRB gender-guidelines recognise that women often experience types of persecution different from those faced by men and acknowledge that these forms of persecution can be the basis for a refugee claim.¹⁷⁵ Whilst the respective guidelines raise the profile of gender-based forms of persecution, including FGM, the recognition of such forms of sexual violence as persecution has been particularly challenging within the US context. This stems in part from, “a confusing tendency to conflate the question of whether the harm is serious enough to constitute persecution with the question of whether the persecution is on account of an enumerated Refugee Convention ground”.¹⁷⁶ The result is that decision-makers, therefore, tend to rule that sexual forms of violence will not amount to persecution unless committed for a Refugee Convention reason.¹⁷⁷ Consequently, sexual violence tends to be summarized under the dichotomy of private/personal violence. This dichotomy is particularly apparent in the case of *Klawitter v INS*,¹⁷⁸ involving sexual harassment and threats of rape by a colonel in the Polish secret police. The court determined that, “harms or threats of harm based solely on sexual attraction do not constitute persecution”.¹⁷⁹ This reasoning highlights the ignorance of the court in recognising both the power dynamics of sexual harassment and the ways in which sex can be used as a weapon of abuse.¹⁸⁰ It also fails to keep the question of whether harassment

¹⁷⁵ See generally, CIRB Gender Guidelines, *supra* note 3, Section B: Considerations; INS Gender Guidelines, *supra* note 5, at 4-5; UK Gender Guidelines, *supra* note 8, Section 2A.17. These forms of abuse include, but are not limited to FGM, sexual abuse, domestic violence and bride-burning to name but a few. The Home Office Asylum Policy Instruction also provides that, there are many forms of harm that are more frequently or only used against women that may constitute torture or cruel, inhuman or degrading treatment and which may amount to persecution. Such persecution, if for a Convention reason, could result in the woman being recognised as a refugee. These include but are not limited to: marriage-related harm (e.g. forced marriage); violence within the family or community (e.g. honour killings); domestic slavery; forced abortion; forced sterilization; forced prostitution; trafficking; female genital mutilation; sexual violence and abuse; and rape. See, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 5.

¹⁷⁶ Macklin, *supra* note 2, at 39.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Klawitter v INS*, 970 F.2d 149 (6th Cir. 1992).

¹⁷⁹ *Ibid.*, at 152. The subtext seems to be that if a perpetrator happens to deprive personal pleasure from inflicting harm, the motive can be described as sexual gratification and the conduct does not constitute persecution. Macklin, *supra* note 2, at 39.

¹⁸⁰ Macklin, *supra* note 2, at 39.

constituted persecution analytically distinct from whether the harassment was motivated by a Convention ground.¹⁸¹

Conversely, however, in 1987 the Ninth Circuit in a case concerning the enslavement and abuse of a woman by a military officer ruled that this ‘private harm’ took on an inherently public character because the officer falsely denounced the claimant for alleged political subversion when she resisted his abuse.¹⁸² As such the court characterised the claim as persecution for imputed political opinion. On the other hand, in another case decided in the same year as *Lazo-Majano*, it was determined that the gang-rape of female family members of politically active males was not evidence of persecution on grounds of imputed political opinion, but rather a ‘personal harm’, based on an unlawful expression of sexual desire.¹⁸³ In *Matter of Krome*,¹⁸⁴ decided in 1993, the BIA in a case with strikingly similar facts to *Campos*, determined that the gang-rape and beating of a Haitian woman in retaliation for her political activities was ‘grievous harm’ amounting to persecution.¹⁸⁵ The INS gender-guidelines do not reconcile these divergent cases, instead they emphasise that the, “appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm”.¹⁸⁶ According to leading academics in the field it can only be hoped that the explicit recognition in the INS guidelines that, “severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution”, will negate the tendency of some US decision-makers to view the motivation for rape as ‘sexual desire’ as stated in *Campos*, and therefore not causally connected to an enumerated persecution ground.¹⁸⁷

¹⁸¹ *Ibid.*

¹⁸² *Lazo-Majano v INS*, 813 F.2d 1432 (9th Cir. 1987).

¹⁸³ *Campos-Guardado v INS*, 809 F.2d 285 (5th Cir. 1987), *supra* note 63.

¹⁸⁴ *See*, INS Gender Guidelines, *supra* note 5, at 9 (citing *Matter of Krome*, BIA May 25, 1993).

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.* *See also*, Macklin, *supra* note 2, at 40.

¹⁸⁷ Macklin, *supra* note 2, at 40. It should be noted here that I do not advocate that all forms of beating amount to persecution, in fact it is possible that grievous bodily harm may be occasioned without a persecutory motive. It might also be argued that not every instance of rape and sexual assault constitutes persecution either, ultimately this depends on the facts/surrounding circumstances of the case.

Despite the divergent decisions discussed, some progress at the US Federal Court level has emerged, arguably as a result of the implementation of the INS gender-guidelines.¹⁸⁸ In 1996 and 1997 respectively, the Courts of Appeal for the Ninth and Seventh Circuits rejected the lower tribunals' view that sexual abuse of political dissidents was a product of sexual desire and did not constitute persecution¹⁸⁹ even though these courts are not bound nor formally subject to the gender-guidelines.¹⁹⁰ In 2004, the Court of Appeals for the Ninth Circuit granted Guatemalan Reina Izabel Garcia-Martinez's Petition for Review of an adverse BIA decision.¹⁹¹ A victim of gang-rape by soldiers in her native country in 1993, the decision recognized that Ms. Garcia-Martinez was entitled to protection under national and international laws that offer sanctuary for individuals who have been subjected to torture and other egregious treatment in their homelands.

Thus, the danger of characterizing some forms of violence against women as 'private' and not 'persecutory' is particularly evident in relation to domestic violence.¹⁹² The INS gender-guidelines, however, designate domestic violence to be both 'private action'¹⁹³ and a form of persecution.¹⁹⁴ Unfortunately, the guidelines only make reference to one case concerning domestic violence, and its treatment.¹⁹⁵ The guidelines treatment of domestic violence hardly proceeds beyond this. This is surprising given the fact that the US criminal justice system has criminalized domestic violence. Such violence is treated as a serious crime, not as a private family matter. A more telling sign of the guidelines' inadequacy regarding domestic violence within the refugee context is evident in the post gender-guidelines adoption era of scholarly articles, arguing that asylum claims based on domestic violence do fit within the refugee definition as applied and interpreted by US

¹⁸⁸ Anker D *et al*, "Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims to Protection in Canada and the United States" 2 Bender's Immigration Bulletin 608, (1997), at 612-4.

¹⁸⁹ *Angoucheva v INS*, 106, F.3d 781 (7th Cir. 1997), at 790, 791, 793; *Lopez Galarza v INS*, 99 F.3d 954 (9th Cir, 1996), at 963 (in this case, the 7th Cir also ruled that the claimant had been raped and beaten on account of her political beliefs). *Ibid*, at 960.

¹⁹⁰ Please refer to Section 2B detailing the courts and bodies subject to the various gender guidelines under consideration.

¹⁹¹ *Reina Izabel Garcia-Martinez vs. John Ashcroft*, 371 F.3d 1066 (2004).

¹⁹² Macklin, *supra* note 2, at 40.

¹⁹³ INS Gender Guidelines, *supra* note 5, at 18.

¹⁹⁴ *Ibid*, at 9.

¹⁹⁵ *Ibid*, at 17 (citing the case of *Matter of Pierre*, 15 I & N Dec. 461 (BIA 1975) (In that particular case the BIA determined that spousal abuse by a Haitian legislator did not itself make abuse of his wife persecution on account of political opinion even though the Haitian Government would not restrain the husband).

decision-makers.¹⁹⁶ Furthermore in 1999, the BIA denied asylum to Rody Alvarado, a Guatemalan woman who fled years of brutal domestic violence.¹⁹⁷ Whilst initially granted asylum, on appeal the BIA reasoned that the claimant was ineligible for refugee protection because the abuse she suffered resulted from ‘personal circumstances’ that lacked larger societal relevance.¹⁹⁸ The BIA’s decision in *Matter of R-A-* provoked a firestorm of criticism, leading to a series of Executive actions. In 2000, under the leadership of then-Attorney General Janet Reno, the DOJ proposed regulations to address cases such as Ms. Alvarado’s.¹⁹⁹ After the R-A rule was issued, Reno vacated the BIA’s decision in *Matter of R-A-*, denying relief and remanding the case to the BIA with instructions to stay the case until the proposed regulations were finalized. Then, in 2003, AG John Ashcroft took jurisdiction and ordered lawyers for the parties to brief the issues in the case. In its 2004 brief, the Department of Homeland Security reversed course from the government’s previous position and argued that Ms. Alvarado had established statutory eligibility for asylum based on her membership in a PSG.²⁰⁰ Ashcroft did not rule on the case but sent it back to the BIA with the same instructions as his predecessor, for the BIA to reconsider the case once the proposed regulations were issued as final. To date, the proposed regulations have not been issued in final form.²⁰¹ In 2008, Attorney General Michael

¹⁹⁶ See, Anker D et al, “Women Whose Governments are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law” 11 Georgetown Immigration Law Journal 709, (1997).

¹⁹⁷ For a detailed analysis of the case and resulting implication, see CGRS, “Domestic-Violence Based Asylum Claims: CGRS Practice Advisory”, (2014), available online at [https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20\(Sept%202012,%202014\).pdf](https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20(Sept%202012,%202014).pdf) (last accessed 22/3/17), at 3-6. See also, Sinha, *supra* note 10, at 1586-1590. See also, *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999).

¹⁹⁸ *Ibid*, at 915-920.

¹⁹⁹ Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (proposed Dec. 7, 2000) (hereafter R-A Rule). Although the actual regulation is very short, it is preceded by a lengthy preamble, which includes a substantial amount of guidance favourable to gender claims based on domestic violence. Notably, the preamble states that the purpose of the regulation is to remove “certain barriers that the *In re R-A-* decision seems to pose” to domestic violence claims, and recognizes that gender is an immutable characteristic and that marital status may be considered immutable in appropriate circumstances. See, CGRA Practice Advisory, *supra* note 197, at 4.

²⁰⁰ See, DHS’s Position on Respondent’s Eligibility for Relief, *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005) (A 73 753 922), available online at <https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf> (last accessed 28/5/17).

²⁰¹ See, Domestic Violence Based Asylum Claims -*Fuentes-Erazo v. Sessions*, 848 F.3d 847 (8th Cir. 2017), (2017), available online at https://www.law.umn.edu/sites/law.umn.edu/files/cna_2017_cle_federal_immigration_litigation_-_dv_asylum.pdf (last accessed 8/6/17).

Mukasey lifted the stay previously imposed on the BIA, as the regulations were still pending, and remanded the case for reconsideration of the issues presented with respect to asylum claims based on domestic violence. Because of the length of time the case had been pending, Ms. Alvarado and DHS made a joint request to send the case back to the immigration judge for the submission of additional evidence and legal arguments. After the submission of these materials, DHS stipulated to a grant of asylum, and finally, in December 2009, after enduring more than a decade of legal limbo, Ms. Alvarado was granted asylum. Because the grant was by stipulation, there is no extensive decision; the judge's order, which is less than a sentence long, simply refers to the agreement of the parties.²⁰² Because the *R-A-* case had become the battleground on which the issue of domestic violence as a basis of asylum had been fought for more than a decade, the victory had great symbolic significance. However, it has no binding precedential value.²⁰³

On a positive note, following a 15-year silence since its decision in *R-A-*, the BIA issued a precedential decision, *Matter of A-R-C-G-*, recognizing domestic violence as a basis for asylum in 2014.²⁰⁴ The applicant in that case, a mother of three had suffered what the decision deems "repugnant abuse" at the hands of her husband, including beatings and rapes. The BIA found that women fleeing domestic violence can be members of a PSG. Although the BIA in that case affirmed the principle that cognizability of a social group must be determined on a case-by-case basis, the BIA's analysis should help advocates in building their cases to establish group membership for women fleeing

²⁰² The Immigration Judges decision simply stated that: "Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum]." See, *CGRA Practice Advisory*, *supra* note 197, at 5.

²⁰³ After AG Mukasey's 2008 order issued, the BIA remanded some domestic violence cases back to the immigration court for attorneys to supplement the records in their cases. And, on at least one occasion, the BIA provided an applicant with the opportunity to submit an application for asylum in light of the AG's decision. See, e.g., *In re: Ventura-Aguilar*, A 98-400-001, 2009 Immig. Rptr. LEXIS 781 (BIA Dec. 2009) (remanding to IJ to provide opportunity for applicant to submit application for asylum and withholding of removal in light of vacatur of *R-A-*). See also, e.g., *Morrison v. INS*, 166 F. App'x 583 (2d Cir. 2006) (reversing BIA's denial of applicant's motion to reconsider for failure to consider issues related to domestic violence claim in light of vacatur of *R-A-*). On the other hand, CGRS's non-official tracking of cases has revealed that the BIA has also denied several motions to reopen to present asylum claims based on domestic violence in light of Mukasey's 2008 order and the DHS's position taken in *Matter of L-R-*, discussed *infra*. This is not to say that attorneys should forego filing a motion to reopen where the circumstances so require, but rather, to alert attorneys to one potential outcome. The argument for reopening is stronger now after the BIA's long-awaited precedential decision (discussed in the following section), issued on August 26, 2014, recognizing domestic violence as a basis for asylum. See *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014). See, *CGRA Practice Advisory*, *supra* note 197, at 5.

²⁰⁴ *Matter of A-R-C-G-* 26 I. & N. Dec. 388.

domestic violence from Guatemala and elsewhere. This sentiment could also be applied to women fleeing FGM. Importantly, the BIA's recent recognition that women fleeing domestic violence at the hands of their intimate partners are deserving of asylum protection where their governments are unable or unwilling to protect them, sends a clear mandate to decision-makers that these cases must be carefully considered and cannot be rejected categorically as "unworthy" of relief.²⁰⁵

While the CIRB gender-guidelines are very brief on the issue of types of gender-specific serious harm, the main principle is that what constitutes persecution should be determined by reference to various international human rights instruments, including CEDAW.²⁰⁶ As such, the CIRB gender-guidelines arguably acknowledge domestic violence as a form of persecution directed against women. Similarly, the UK gender-guidelines state that whether treatment amounts to 'serious harm' should be decided on the basis of international human rights standards.²⁰⁷ More specifically, the UK guidelines note that harm within the family includes various cultural practices relating to marriage, such as forced marriages, honour killings, dowry deaths and sati.²⁰⁸ There is, however, no further discussion on domestic violence as persecution, other than a note to the effect that treatment which would constitute serious harm if it occurred outside the home, will also constitute serious harm if it occurs within a family context.²⁰⁹ Arguably, the reference to international standards in both guidelines is intended to demonstrate that the conduct in question, whether it is domestic violence or another form of gender-based violence, violates universally recognised human rights.²¹⁰

²⁰⁵ See, CGRA Practice Advisory, *supra* note 197, at 6.

²⁰⁶ See, CIRB Gender Guidelines, *supra* note 3, Section B: Considerations.

²⁰⁷ UK Gender Guidelines, *supra* note 8, Section 2A.1. ("Whether harm, including gender-specific harm, amounts to persecution should be assessed on the basis of internationally recognised human rights standards"). For a more detailed discussion, see Section 2A generally. Refer also to Annex II for a list of International Instruments referred to in the guidelines. The Home Office Asylum Policy in defining gender, refers explicitly to the definitions/approaches endorsed in the UNHCR Handbook, the EU Qualification Directive, the Refugee or Person in need of International Protection (Qualification) Regulations 2006 and the European Convention on Human Rights. The policy does state that further guidance can be obtained from the Asylum Policy Instruction on Assessing the Claim. See generally, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8.

²⁰⁸ UK Gender Guidelines, *supra* note 8, Section 2A.24. See also, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 5 (detailing forms of harms committed against women which may amount to persecution. Such violence includes violence within the family or community).

²⁰⁹ UK Gender Guidelines, *supra* note 8, Section 2A.23.

²¹⁰ Macklin, *supra* note 2, at 41.

The INS gender-guidelines do not unequivocally identify international human rights instruments as aids to defining persecution. Instead, they interpret persecution to mean, “threats to life, torture, and economic restrictions so severe that they constitute a threat to life or freedom”²¹¹ by referring to leading US jurisprudence. According to some experts, the decision to rely on jurisprudence may indicate that the drafters were not concerned about allegations of cultural imperialism,²¹² or that international law does not have the same status of legitimacy in the US as it does in Canada and the UK.²¹³

Another set of gender-specific practices which decision-makers have traditionally resisted labelling as persecutory relates to discriminatory law/policies which apply to women. Discrimination as a form of persecution has also been addressed in the gender-guidelines. According to the UK gender-guidelines discrimination may amount to ‘serious harm’, or be a factor which turns ‘harm’ into ‘serious harm’ or be a factor in failure of state protection (for example, discriminatory access to police protection).²¹⁴ A discriminatory measure may, in itself or cumulatively with others, be ‘serious harm’ for example if the discrimination has prejudicial consequences for the person concerned (e.g., restrictions on freedom of movement or lack of access to education).²¹⁵ The guidelines continue to note that a wide range of (discriminatory) penalties that may be imposed on women for disobeying restrictions placed on women may also constitute serious harm.²¹⁶ Further, the guidelines note that some discriminatory restrictions on women may also have for example, social or medical consequences which constitute serious harm.²¹⁷ Arguably, therefore the collective effect of the “web of discriminatory laws, policies and practices restricting where a woman can travel, what she can wear, her education and job

²¹¹ INS Gender Guidelines, *supra* note 5, at 8-9 (citing *Matter of Acosta*, 19 I & N Dec. 211, 222 (BIA 1985)).

²¹² Macklin, *supra* note 2, at 41-2.

²¹³ See Anker D, ‘Rape in the Community as a Basis for Asylum’, *supra* note 188, at 609.

²¹⁴ UK Gender Guidelines, *supra* note 8, Section 2A.7. See also, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 6 (addressing the issue of Discrimination and the circumstances in which discriminatory measures may amount to persecution).

²¹⁵ UK Gender Guidelines, *supra* note 8, Section 2A.10 & 2A.11. See also, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 6.

²¹⁶ UK Gender Guidelines, *supra* note 8, Section 2A.12.

²¹⁷ *Ibid*, Section 2A.13. For example, consequences for women in child or arranged marriages, or on divorce or widowhood.

opportunities, her ability to marry, divorce, and have custody of children could amount to persecution”.²¹⁸

The CIRB gender-guidelines similarly provide that discriminatory laws may constitute persecution if the law or policy is inherently persecutory, or is used as a means of persecution for one of the enumerated grounds; if the law or policy, although having legitimate goals, is administered through persecutory means or if the penalty for non-compliance with a policy or law is disproportionately severe.²¹⁹ Usually in cases of this nature, decision-makers will focus on the penalties for non-compliance with the law.²²⁰ Accordingly, in *Namitabar v Canada*,²²¹ decided shortly after the adoption of the CIRB gender-guidelines the Federal Court determined that seventy-five lashes for breach of the Iranian law governing women’s dress was disproportionate to the objective of the law and thus constituted persecution. This approach according to Indra, circumvents judgements about the legitimacy of the law itself, and focuses instead on the penalty as persecutory in relation to its purpose.²²²

The INS gender-guidelines also explore this particular issue through case-law involving female claimants who have objected to the discriminatory strictures imposed upon them. In the US, the position is that compelling obedience to a law constitutes persecution if it requires a person to renounce or violate deeply held religious or fundamental beliefs.²²³ The guidelines further assert that, certain penalties for violating discriminatory laws might constitute persecution.²²⁴

According to Macklin, the 1996 US judgement in *Fisher v INS*,²²⁵ as discussed in the guidelines adopts an even harsher stance.²²⁶ In *Fisher*, the Ninth Circuit ruled that while dress restrictions on Iranian women constituted sex discrimination, they did not amount

²¹⁸ Macklin, *supra* note 2, at 42.

²¹⁹ CIRB Gender Guidelines, *supra* note 3, Section B: Considerations.

²²⁰ Macklin, *supra* note 2, at 42.

²²¹ *Namitabar v Canada*, (1994) F.C. 42, 47.

²²² *Ibid.* See also, Indra D, “*Engendering Forced Migration: Theory and Practice*”, Berghahn Books: Oxford, (2008), at 285.

²²³ See, for example, *Fatin v. INS*: “governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs.” 12 F.3d 1233, US Court of Appeal (3rd Cir.) 1993.

²²⁴ Macklin, *supra* note 2, at 43. See also, *Fisher v. INS*, 79 F.3d 955, US Court of Appeals (9th Cir.) 1996.

²²⁵ *Fisher v INS*, *supra* note 224.

²²⁶ INS Gender Guidelines, *supra* note 5, at 10. Macklin, *supra* note 2, at 43.

to persecution. Judge Wallace declared that, “the mere existence of a law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States”.²²⁷ The court did not find it necessary to address the length or conditions of imprisonment, nor did it allude to the possibility of flogging described in other cases including *Fatin*, concluding that, “there also is no evidence suggesting that if she returned to Iran, Fisher would not conform with the regulations”.²²⁸ Finally, even though the claimant testified that, as a Muslim, she opposed the fundamentalist regime in Iran, the court reasoned that:

she failed to show that the Iranian government took action against her because of her political or religious beliefs. Indeed, the record indicates that Fisher received routine punishment for violating generally applicable laws.²²⁹

Only the dissent in *Fisher* mentions the INS gender-guidelines.²³⁰ According to Judge Noonan, the guidelines are an invitation to develop asylum law with special attention to the problems of women oppressed on account of their nonconformity with the moral codes of a rigorist regime.²³¹ Arguably, the guidelines were not applied because the case began before they were issued.²³² I would agree, however, with her assertion that the fact that they were not applied is disappointing, insofar as the legal analysis contained in the guidelines, “do not change the law, and thus are applicable anytime to any set of facts by anyone who finds them persuasive”.²³³

B. Well-Founded Fear of Persecution

²²⁷ *Fisher v. INS*, *supra* note 224, at 962.

²²⁸ *Ibid.*, at 963.

²²⁹ *Ibid.*, at 964.

²³⁰ *Ibid.*, at 967-8.

²³¹ *Ibid.*

²³² *Ibid.*, at 969. *See*, Macklin, *supra* note 2, at 44.

²³³ *Ibid.*

In addition to a fear of persecution, a claimant must also establish that her fear is well-founded. It can, therefore, be said that there is a well-founded fear of persecution when it is likely that the individual concerned will face persecution if returned to their country of origin. It is generally accepted that this particular concept has both a subjective and an objective element and to determine whether a well-founded fear of persecution exists both elements must be addressed.²³⁴

The standards of proof as to when fear is well-founded applied by authorities in different countries vary. In the US, a claimant must demonstrate ‘a reasonable possibility of persecution’,²³⁵ and in Canada, the courts require that there be a ‘reasonable chance’ (or ‘good grounds for fearing persecution’) standard;²³⁶ whereas an (arguably somewhat more restrictive) ‘reasonable degree of likelihood’ or ‘real and substantial danger of persecution’ test is applied in the UK.²³⁷ It seems, however, that most jurisdictions recognise a standard of proof, which requires degrees of likelihood far short of any balance of probability test (that is, persecution is more likely than not).²³⁸

The appropriate starting point in determining whether the claimant’s fear of persecution is well-founded is an examination of the general human rights record of a claimant’s country. It should be noted here, however, that human rights information is not determinative of a claim to refugee status; the usefulness of human rights data is to establish a (rebuttable) presumption of risk of harm which then must be tested against the whole of the evidence presented, in particular the claimant’s own evidence and testimony.²³⁹ The fear of persecution must not (necessarily) be based on personal experiences of the claimant. Experiences of friends or relatives or other persons belonging to the same race or social group can indicate that the claimant’s fear of being persecuted is well-founded.

²³⁴ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, 1979. (Hereafter UNHCR Handbook), para 37-8.

²³⁵ “[A] moderate interpretation of the ‘well-founded fear’ standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.” *INS v. Cardoza Fonseca*, US Supreme Court, 467 US 407 (1987).

²³⁶ *Adjei v. Minister of Employment and Immigration*, [1989] 2 FC 6680, 683 OR (1989) 7 Imm. L.R. (2d) 169 (FCA).

²³⁷ *R. v. Secretary of State for the Home Department, ex parte Sivakumaran et al*, [1988] All ER 193.

²³⁸ See, Goodwin-Gill, *supra* note 23, at 39. See also, Luopajarvi, *supra* note 137, at 9-10.

²³⁹ Luopajarvi, *supra* note, 137, at 10. See also, Hathaway J, “*The Law of Refugee Status*”, Butterworths: Toronto, (1991), at 80-3.

Furthermore, a person is considered as having a well-founded fear of being persecuted is he/she has already been subject to harm amounting to persecution.²⁴⁰ Past persecution is, however, not a prerequisite to recognition as a refugee.²⁴¹

In Canada, most documentation concerning country conditions used in the hearing rooms is assembled and generated by the IRB Documentation Centre. Since the introduction of the CIRB gender-guidelines, the Documentation Centre has sought and gathered information concerning the condition of women in many countries, and has produced various country profiles synthesizing information from a range of sources.²⁴² The UK gender-guidelines in acknowledging the limited documentary evidence available in relation to the problems faced by women encourages decision-makers to conduct their own research into country of origin conditions, including use of country of origin information (COI) reports produced by the Country Information and Policy Unit of the Home Office.²⁴³ Similarly, in acknowledging that asylum officers must be able to rely on objective and current information on the legal and cultural situation of women in their countries of origin, on the incidence of violence, and on the adequacy of state protection afforded to them, the INS gender-guidelines stipulate that the Resource Information Centre will deal with these issues and in turn will, “attempt to assure that information concerning violations of the rights of women are distributed regularly and systematically to all asylum officers”.²⁴⁴

Nevertheless, despite such innovative efforts, violence against women has long been shrouded in a culture of silence. Consequently, reliable statistics are hard to come by, as sexual and physical violence against women is underreported at all levels because of

²⁴⁰ UNHCR Handbook, *supra* note 234, para 42-5.

²⁴¹ Luopajarvi, *supra* note, 137, at 10.

²⁴² Macklin, *supra* note 2, at 47.

²⁴³ Commonly referred to as the Country of Origin Information Service (COI Service). Further information on the COI Service is available online via the Gov.UK website at <https://www.gov.uk/government/collections/country-policy-and-information-notes> (last accessed 23/7/17). See also, UK Gender Guidelines, *supra* note 8, Section 5.50-51. Compare with, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 7 (which merely states that, “Case owners should: refer to objective country of origin information provided by the Country of Origin Service (COIS), in particular the sections on women; make (where necessary) a case specific research request to COIS; refer to Country Guidance cases (principally found in the country Operational Guidance Notes); and take into account the relevant sections on actors of persecution and the sufficiency of state protection in the AI Considering the protection (asylum) claim and assessing credibility).

²⁴⁴ INS Gender Guidelines, *supra* note 5, at 8.

shame, stigma and fear of retribution. Accordingly, the type of detailed information capable of confirming an individual claimant's narrative regarding FGM may not be readily available.²⁴⁵ Decision-makers in Canada and the UK are cautioned to be sensitive to these limitations.²⁴⁶

C. Lack of State Protection and Agents of Persecution

As already established, the purpose of refugee law is to provide substitute protection of the international community in situations where it is not reasonable to expect national protection of basic human rights in the claimant's country of origin. Thus, when determining whether there is a risk of persecution, the State's ability and willingness to effectively respond to such a risk must be assessed.²⁴⁷ When determining whether a certain treatment can be called persecution, two elements must be satisfied; first, whether the harm feared amounts to 'persecution'; and second, whether the State can be held responsible for the harm.²⁴⁸ If it can be established that meaningful national protection is available a 'well-founded fear of persecution' cannot be said to exist.²⁴⁹

The "most obvious" form of persecution is confined to situations where human rights are violated by organs of the State, in pursuance of a "formally sanctioned persecutory

²⁴⁵ Macklin, *supra* note 2, at 48.

²⁴⁶ *Ibid.* See also, UK Gender Guidelines, *supra* note 8, Section 5.50; CIRB Gender Guidelines, *supra* note 3, at Framework of Analysis, para 3. Whilst the Home Office Asylum Policy Instruction do not caution to be sensitive to these limitations, they do state that, "It is important to consider fully relevant objective evidence including the country information provided by the Country of Origin Information Service. The absence of objective information to corroborate a claimant's account is likely to be an important factor but should not necessarily be taken to mean that human rights abuses do not occur. For instance, systematic abuse of a certain group would usually be documented, but isolated acts of ill treatment perpetrated by one person on another would not". *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 19.

²⁴⁷ Hathaway, "The Law of Refugee Status", *supra* note 239, at 125. This line of reasoning has been approved in national case law, *see for example*, *Islam and Shah, R v IAT ex parte Shah* [1999] INLR 44, [1999] Imm AR 283 (HL). (Hereafter referred to as *Islam and Shah*); *Horvath v. Secretary of State for the Home Department*, UK House of Lords, [2001] 1 AC 489; *Refugee Appeal no. 71427/99*, New Zealand Refugee Status Appeals Authority, [2000] NZAR 545; and *MIM v. Khawar*, High Court of Australia 2002, [2002] HCA 14. See also, Luopajarvi, *supra* note, 137, at 14.

²⁴⁸ Macklin A, "Refugee Women and the Imperative of Categories" 17 Human Rights Quarterly 213, (1995), at 222.

²⁴⁹ Hathaway, "The Law of Refugee Status", *supra* note 239, at 125.

scheme”.²⁵⁰ This could be called “State persecution.”²⁵¹ Second, persecution may also consist of “non-conforming behaviour” by State officials, which is not subject to a timely and effective rectification by the State.²⁵² Third, seriously harmful acts, including human rights violations, committed by private individuals or groups of persons, when the government is unwilling to offer protection also amounts to persecution.²⁵³ Thus, as long as the State fails to protect a person at risk, the reason for failure to protect is irrelevant; whether it is indifference or genuine incapability. Neither does the fact that the authorities are willing to offer protection change the situation if the authorities still remain incapable of offering such protection.²⁵⁴ Hence, the need for surrogate protection arises when the State ignores or is unable to react to legitimate expectations of protection and thus fails its duty to protect its citizens.²⁵⁵

One of the central questions regarding persecution by non-State actors and failure of State protection is what standard of protection the State must be able to afford the individuals concerned. According to the UK gender-guidelines failure of State protection may occur as a result of: legal provisions or the absence of such provisions; lack of access to justice and police protection; lack of police response to requests for assistance, or a reluctance, refusal, or a failure to investigate, prosecute or punish individuals; and encouragement or toleration of particular social, religious or customary laws, practices, and behavioural norm, or an unwillingness or inability to take action against them.²⁵⁶ In

²⁵⁰ *Ibid.*

²⁵¹ Yeo C, ‘*Agents of the state: When is an official of the state and agent of the state?*’ 14 International Journal of Refugee Law 4, (2002), at 517.

²⁵² Hathaway, ‘*The Law of Refugee Status*’, *supra* note 239, at 125. *See also*, Luopajarvi, *supra* note, 137, at 14-15.

²⁵³ Hathaway, ‘*The Law of Refugee Status*’, *supra* note 239, at 126.

²⁵⁴ Luopajarvi, *supra* note, 137, at 15.

²⁵⁵ *Ibid.* *See also*, Macklin, ‘*Refugee Women and the Imperative of Categories*’, *supra* note 248, at 234; Hathaway, ‘*The Law of Refugee Status*’, *supra* note 239, at 126-8; Hyndman P, ‘*The 1951 Convention definition of refugee: An appraisal with particular reference to the case of Sri Lankan Tamil Applicants*’, 9 Human Right Quarterly 49, (1987), at 67.

²⁵⁶ UK Gender Guidelines, *supra* note 8, Section 2B.8 & 2B.9. *See also*, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 7-8 (discussing the failure of state protection: “The ways in which particular laws, social policies or practices (including traditions and cultural practices) are implemented may constitute or involve a failure of protection. Thus, for example, (1) a law, policy or practice may have a “legitimate” goal, e.g. the maintenance of law and order out of respect for genuine religious or social sensitivities, but be administered through persecutory means; (2) the penalty for non-compliance with the law or policy may be disproportionately severe against certain women/groups; or (3) a law, policy or practice may not be enforced in practice and therefore fail to deter or prevent the banned behaviour). The Policy Instruction, like the UK Gender-Guidelines further posits that, “Women may be

the UK the leading decision on the issue comes from *Horvath v SSHD*,²⁵⁷ Decided in 2000, this decision, argues that the standard of required protection is not one that which would eliminate all risk but, “a practical standard, which takes proper account of the duty which the State owes to all its own nationals”.²⁵⁸ Referring to the European Court of Human Rights’ decision in the *Osman* case,²⁵⁹ Lord Clyde formulated the test for sufficient protection as follows:

there must be in place a system of domestic protection and machinery for the detention, prosecution and punishment of acting’s contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn between beyond that generality is necessarily a matter of the circumstances of each particular case.²⁶⁰

In reference to *Horvath*, the Court of Appeal in *Skenderaj*²⁶¹ further notes that the sufficiency of State protection has to be measured against the practical limitations on a State to protect its citizens from violence or threats of violence to which it is not alerted and its protection is deliberately not sought. To do so arguably would impose on the State a duty of guarantee which would be disproportionate.²⁶² Thus, in cases of non-State persecution, to satisfy the sufficiency of protection test in the UK, a claimant would need to show that the system of protection has failed her and is ineffective. According to Yeo, unless the claimant has approached the authorities on a number of occasions in relation to

subject to gender-related abuse resulting from social customs or conventions because there is no effective means of legal recourse to prevent, investigate or punish such acts. Such failure of state protection may include, but is not limited to, legislation (e.g. marital rape exemptions in law), lack of police response to pleas for assistance and/or a reluctance, refusal or failure to investigate, prosecute or punish individuals and encouragement or toleration of particular social/ religious/customary laws, practices and behavioural norms or an unwillingness or inability to take action against them. For example, the state may make an act that can amount to persecution, such as FGM, illegal, but continue to condone or tolerate the practice or be unable to put an effective end to the custom because of its widespread cultural acceptance”.

²⁵⁷ *Horvath*, *supra* note 247.

²⁵⁸ *Ibid.*

²⁵⁹ *Osman v UK*, 28th Oct. 1998, ECHR Reports 1998-VIII.

²⁶⁰ *Horvath*, *supra* note 247, per Lord Clyde as reprinted in 13 International Journal of Refugee Law ½ (2001), at 194.

²⁶¹ *Skenderaj v. SSHD*, CA Civ. 26 Apr. 2002, [2002] EWCA Civ 567.

²⁶² Luopajarvi, *supra* note, 137, at 75. See also, *Skenderaj*, *supra* note 261, per Auld L.J. para 43 (referring to *Osman v UK*, *supra* note 259, para 116).

a number of separate incidents, and has consistently been denied protection, the sufficiency of protection test will not be met.²⁶³

In Canada, the traditional standard of State protection has been that of, “adequate though not necessarily perfect” protection.²⁶⁴ The Canadian Federal Court has determined that:

where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection.²⁶⁵

In the 2001 *Nduwimana* case, the Federal Court further stipulated that, protection must not be one-hundred percent effective, but it must be such that a claimant will not be exposed to a serious risk of persecution if returned to the country of origin.²⁶⁶ In conjunction with established jurisprudence, the CIRB gender-guidelines support the notion that decision-makers should consider evidence indicating a failure of State protection if the State or its agents in the claimant’s country of origin are unable or

²⁶³ Yeo, *supra* note 251, at 516 citing *SSHD v. Havlicek*, IAT, 7 Jun. 2000, 00/TH/01488, approved by the Court of Appeal in *Harakel v. SSHD*, [2001] EWCA Civ 884. *See also* Yeo’s discussion of the *Svazas* case (*Svazas v. SSHD*, [2002] INLR 197) in relation to persecution by state official out of the control of the state (“rogue policemen”) and its implications in the ‘sufficiency of protection’ test. *Ibid.*, at 525-28. *See also* Wilsher D, “Non-state actors and the definition of a refugee in the United Kingdom: Protection, accountability of culpability?”, 15 International Journal of Refugee Law 69, (2003), at 87-91.

²⁶⁴ *Zalzali v Canada* (MEI), FC, 30 Apr. 1991, (1991) ACWSJLEXIS 17678; 1991 ACWSJ 20778; 27 A.C.W.S. ed 90.

²⁶⁵ *Canada (MEI) v. Villafranca*, FC 18 Dec. 1992, 18 Imm. L.R. (2d) 130 (FCA). (emphasis added), as cited in Luopajarvi, *supra* note, 137, at 76, note 360.

²⁶⁶ *Nduwimana*, FCTD 23 Jul. 2002, no. IMM-1077-01, 2002 FCT 812, as cited in Luopajarvi, *supra* note, 137, at 76, note 361. Unfortunately, the Court noted that it had not introduced a new test for state protection. *Ibid.* This approach can be compared to the approach in New Zealand and Australian case law, e.g., *ex parte Miah*, High Court 2001; Refugee Appeal No. 71427/99, 16 Aug. 2000: “The proper approach to the question of state protection is to inquire whether the protection available from the State will reduce the risk of serious harm below the level of well-foundedness, or, as it is understood in New Zealand, to below the level of a real chance of serious harm. The duty of the State is not, however, to eliminate all risk of harm.” (emphasis in the original). As quoted in Lambert H, ‘The conceptualisation of ‘persecution’ by the House of Lords: *Horvath v. Secretary of State for the Home Department*’, 13 International Journal of Refugee Law ½, (2001), at 16. This has been called the ‘efficiency of protection’ approach. This approach was explicitly turned down by the UKHL in *Horvath*: “The sufficiency of protection is not measured by the existence of a real risk of an abuse of rights but by the availability of a system of protection of the citizen and a reasonable willingness by the State to operate it.” (*Horvath*, *supra* note 247, per Lord Clyde, emphasis added.)

unwilling to provide adequate protection from gender-related persecution.²⁶⁷ When considering whether it is objectively reasonable for the claimant not to have sought the protection of the State, the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself.²⁶⁸

The guidelines further urge decision-makers that when determining whether the State is willing or able to provide protection to a woman fearing gender-related persecution, including FGM, they should consider the fact that the forms of evidence which the claimant might normally provide as “clear and convincing proof” of State inability to protect, will not always be either available or useful in cases of gender-related persecution.²⁶⁹ For instance, where a gender-related claim involves threats of or actual sexual violence at the hands of government authorities or non-State agents of persecution, where the State is either unwilling or unable to protect, the claimant may have difficulty in substantiating her claim with any “statistical data” on the incidence of sexual violence in her country.²⁷⁰ As such the guidelines stipulate that in such cases, reference may need to be made to alternative forms of evidence to meet the “clear and convincing” test, including testimony of women in similar situations where there was a failure of State protection, or the testimony of the claimant herself regarding past personal incidents where State protection did not materialize.²⁷¹ This, as will be discussed in Chapter Three is a major hurdle for FGM claimants. Moreover, the guidelines state, in situations where a woman's fear is related to personal-status laws or where her human rights are being violated by private citizens, a change in country circumstances may not mean a positive change for the woman, as these areas are often the last to change. An assessment should be made of the claimant's particular fear and of whether the changes are meaningful and effective enough for her fear of gender-related persecution to no longer be well-founded.²⁷² In sum as summarized in *Antony Zhuravlev v. MCI*:

²⁶⁷ CIRB Gender Guidelines, *supra* note 3, Section C.2.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*, Section C.3.

When the agent of persecution is not the state, the lack of state protection has to be assessed as a matter of state capacity to provide protection rather than from the perspective of whether the local apparatus provided protection in a given circumstance. Local failures to provide effective policing do not amount to lack of state protection. However, where the evidence, including the documentary evidence situates the individual claimant's experience as part of a broader pattern of state inability or refusal to extend protection, then the absence of state protection is made out.²⁷³

Unlike Canada, this question has not been as clearly addressed within the US case-law. Before addressing the case-law it is important to note however that the INS gender-guidelines are relatively silent on the issue of State protection, except for the following:

.....the persecutor might also be a person or group outside of the government that the government is unable to or unwilling to control. If the applicant asserts a threat of harm from a non-government source, the applicant must show that the government is unwilling or unable to protect its citizens. It will be important in this regard, though not conclusive, to determine whether the applicant has actually sought help from government authorities. Evidence that such an effort would be futile would also be relevant.²⁷⁴

Unfortunately, the guidelines fail to address evidentiary issues regarding State protection or the standard of 'adequacy' that citizens are entitled to expect.²⁷⁵ US jurisprudence, however, sheds some light on these issues.

Whilst the terminology seems to differ (the US courts use the terminology of 'unable or unwilling to control'), the substantial reasoning is similar to that concerning the adequate standard of protection by UK and Canadian courts.²⁷⁶ The US courts have concluded that a government is, "unable or unwilling to control" if a pattern of government unresponsiveness to serious harm can be determined.²⁷⁷ For instance, in *Aguirre-Cervantes v. INS* the Ninth Circuit Court of Appeals referring to the reluctance of the police to intervene in domestic violence cases, as well as the legality to use 'correction' discipline to handle wives and children, determined that the Mexican

²⁷³ *Antony Zhuravlev v. MCI*, FCTD no. IMM-3603-99, 14 Apr. 2000, as cited in Luopajarvi, *supra note*, 137, at 76-77, note 366.

²⁷⁴ INS Gender Guidelines, *supra note* 5, at 17.

²⁷⁵ Macklin, *supra note* 2, at 52.

²⁷⁶ Luopajarvi, *supra note*, 137, at 77.

²⁷⁷ See, R-A Rule, *supra note* 199, at 76591.

government was unable or unwilling to control the abusive behaviour of the applicant's father.²⁷⁸ Also, in *Abankwah v. INS*, in a case concerning a woman who had sought asylum in the US and withholding of deportation on the grounds that should she return to Ghana, she would be forced to undergo FGM as a consequence of having engaged in premarital sex, the Second Circuit Court of Appeals held that as the number of prosecutions had been insignificant (only seven arrests between 1994 and 1999) there was not sufficient State protection even if the practice of FGM had been criminalized in Ghana.²⁷⁹ Alternatively, in *Elnager*, the Ninth Circuit has held that where there exists full administrative and judicial mechanisms for remedy, and the government goes to considerable effort to ensure that violence or threat of it against religious minorities does not occur, the government is not unable or unwilling to control persecutors.²⁸⁰

Furthermore, the proposed R-A- Rule further states that:

in evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the immigration judge or asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists.²⁸¹

According to some experts, based on the jurisprudence, the US takes a similar approach to the British courts in *Horvath*, emphasizing the existence of legislation, machinery for prosecution and punishment of private harm, as well as willingness to operate such systems.²⁸²

D. “For reasons of...” or Nexus to a Persecution Ground

²⁷⁸ Luopajarvi, *supra note*, 137, at 77. *See also*, *Aguirre-Cervantes v. INS*, No. 99-70861 (9th Cir. 2001), at 595-96.

²⁷⁹ *Abankwah v. INS*, CA (US) 2nd Cir., 9 Jul 1999, 185 F.3d 18, at 21.

²⁸⁰ *Elnager v. INS*, (9th Cir. 1991), 930 F.2d 784, 789, as cited in *Aguirre-Cervantes v. INS*, *supra note* 278, at 368, 596.

²⁸¹ R-A Rule, *supra note* 199, at 76597, Section 208.15(a)(1) (emphasis added). *See also*, Luopajarvi, *supra note*, 137, at 78.

²⁸² Luopajarvi, *supra note*, 137, at 78.

After a claimant proves that she has a well-founded fear of persecution, she must then satisfy the statutory requirement that her persecution was on account of one of the enumerated persecution grounds. Meeting this requirement has presented the greatest challenge to female claimants, including those fleeing FGM. Decision-makers have determined either that the claimant does not fall within the statutorily protected category claimed, or that the violence was not inflicted on account of the protected ground.²⁸³ Underlying such decisions, as will be reinforced in Chapter Three in relation to FGM, “is the misconception that gender-related violence is a private issue, unconnected to the political and social structures that serve to perpetuate the subjugation of women”.²⁸⁴

Another inherent difficulty experienced by women in establishing that their claim was on account of one of the enumerated persecution grounds stems from the absence of gender as an enumerated persecution ground. None of the gender-guidelines under examination have taken such an innovative step, instead, they merely encourage decision-makers to let gender inform their assessment under the existing grounds if possible. As a last resort, ‘women’ might qualify under the PSG category.

The nexus issue is particularly problematic in cases of non-State persecution, and it is in this respect that the national application of the nexus clause of the refugee definition differs most. According to UNHCR’s interpretation, in cases where there is a risk of being persecuted by non-State actors, for reasons that are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is not related to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is equally established.²⁸⁵

²⁸³ Sinha, *supra* note 10, at 1573. *See also*, Klawitter, *supra* note 178 (finding that the claimants rape by a government official was not motivated by ‘any interest on his part to persecute her’); *Campos-Guardado*, *supra* note 183, (affirming the BIA’s determination that the rapes suffered by the claimant were ‘personally motivated’ and where therefore not on account of her political opinion).

²⁸⁴ Sinha, *supra* note 10, at 1573.

²⁸⁵ For example, where a woman is abused by her husband in a state that takes no action against such abuse, the woman may not be able to establish that her husband has abused her for reasons of her membership in a PSG, or any other Convention ground. Nonetheless, if the state is unwilling to extend protection against the abuse based on one of the Convention grounds, the requirement of a causal link is satisfied. Conversely, in a case where a woman is threatened with FGM by her tribe—on account of her being a female member of a tribe practicing FGM—in a state that prohibits but cannot prevent circumcision, the causal link is

1. Grounds for Persecution

While race is clearly not specific to women, persecution of women for reasons of race frequently takes a gender-specific form, and both the UK and CIRB gender-guidelines note that race and gender may operate in tandem to explain why a claimant fears persecution. The CIRB gender-guidelines note that, “*a woman from a minority race in her country may be persecuted not only for her race, but also for her gender*”,²⁸⁶ whilst the UK guidelines stipulate that, “women may be targeted, not simply because of their race, but also because they are perceived as propagating a racial group or ethnic identity through their reproductive role”.²⁸⁷ The INS gender-guidelines are silent on the intersection of gender and race. Arguably, this omission was because such a broad category could potentially open the flood gate of asylum claimants, as all women from a specific race could in theory apply for asylum. In the case of FGM for instance, with statistics revealing that 88% of women in Sierra Leone undergo FGM,²⁸⁸ the US would fear having to potentially offer protection to all those women. Whilst it is recognised that not all women in Sierra Leone fear FGM²⁸⁹ and the “flood-gate” theory has shown to be unsubstantiated, many courts and anti-immigration advocates continue to use it as

established irrespective whether the lack of state protection is related to a Convention ground or not. *See*, Luopajarvi, *supra note*, 137, at 17-18. *See also*, UNHCR Gender Guidelines, *supra note* 14, para. 21; UNHCR, PSG Guidelines, *supra note* 30, paras. 20-23; Aleinikoff T, “*Protected characteristics and social perceptions: An analysis of the meaning of ‘membership of a particular social group’*”, in Feller E, Türk V & Nicholson F, ‘*Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*’, Cambridge University Press: London, (2003), at 301-303; Summary of Conclusions: Membership of a particular social group, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, No. 6. (Hereafter referred to as UNHCR Summary of Conclusions).

²⁸⁶ CIRB Gender Guidelines, *supra note* 3, Section A.2.

²⁸⁷ UK Gender Guidelines, *supra note* 8, Section 3.6. *See also*, Home Office Asylum Policy Instruction: Gender Issues in the Asylum Claim, *supra note* 8, at 9 which states that, “Whilst actual or attributed racial identity is not specific to women, gender may affect the form that persecution takes in race-related cases. For example, whilst the destruction of ethnic identity and/or prosperity of a racial group may be through killing, maiming or incarcerating men, women may be viewed as propagating ethnic identity through their reproductive role, and may be persecuted through, for example, sexual violence or control of reproduction”.

²⁸⁸ Fofana U, “*Captured and Cut: FGM returns to Sierra Leone despite official ban*”, (2016). This article is available online via The Guardian Website at

<https://www.theguardian.com/global-development/2016/sep/29/female-genital-mutilation-returns-sierra-leone-official-ban> (last accessed 20/7/17).

²⁸⁹ *Ibid.*

justification for narrow asylum definitions. Perhaps the silence in the INS gender-guidelines is a manifestation of this immigration fear.

In respect of nationality, the UK and CIRB gender-guidelines both proclaim that a fear of persecution may also be linked to reasons of nationality where a law causes a woman to lose her nationality because of her marriage to a foreign national. They further caution that, it is not the loss of citizenship that constitutes persecution, but the consequences which result from that loss, i.e. loss of residence rights.²⁹⁰ The INS gender-guidelines regrettably do not discuss nationality as a ground of persecution in a gender context.

With respect to religion, both the CIRB and UK gender-guidelines propose that freedom of religion encompasses the right to practice, or not practice, a prescribed religion. Thus, in a society where “religion assigns certain roles to women”, a woman who “does not fulfil her assigned role and is punished for that....may have a well-founded fear of persecution for reasons of religion”.²⁹¹ The UK gender-guidelines go a step further than their Canadian counterpart and posits that, a woman’s religious identity, like her race may be perceived to be aligned with that of other members of her community or family, including those of her husband or partner who may be of a different religion, and thus faces the risk of losing her own religious identity.²⁹²

Strangely, the INS gender-guidelines do not articulate religion as a ground of persecution in such cases, but rather incorporates it into the definition of persecution. The guidelines quote *Fisher v INS*,²⁹³ a case concerning an Iranian woman who objected to Iranian dress codes. In its determination, the court stated that:

²⁹⁰ CIRB Gender Guidelines, *supra* note 3, Section A.2; UK Gender Guidelines, *supra* note 8, Section 3.9. *See also*, Home Office *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 10 which states that, “Whilst actual or attributed national identity is not specific to women, it may operate in tandem with gender to explain why a woman fears persecution. For example, women may be deprived of full citizenship rights in certain circumstances, if they marry a foreign national. In such circumstances, it may be necessary to consider what harm results from this loss and whether it amounts to persecution on the basis of nationality”.

²⁹¹ CIRB Gender Guidelines, *supra* note 3, Section A.2; UK Gender Guidelines, *supra* note 8, Section 3.11-3.14. *See also*, Home Office *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 9-10 (equally discussing the connection between gender and religion).

²⁹² UK Gender Guidelines, *supra* note 8, Section 3.16. *See also*, Home Office *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 10 what states that, “A woman's religious identity may be perceived to be aligned or shared with that of other members of her family or community. Imputed or attributed religious identity may therefore be important”.

²⁹³ *Fisher v INS*, *supra* note 224, at 1371.

When a person with religious views different from those espoused by a religious regime is required to conform to, or is punished for failing to comply with laws that fundamentally are abhorrent to that persons deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in extreme conduct that is tantamount to persecution.²⁹⁴

The guidelines do not, however, mention that this persecution may be on grounds of religion.²⁹⁵ Again, this silence could be because of floodgates arguments.

In respect of political opinion, the examined guidelines all acknowledge that persecution caused by a woman's resistance to 'institutionalized discrimination', as manifest by her speech or conduct, may amount to persecution on account of her political opinion.²⁹⁶ The CIRB gender-guidelines explicitly state that where women are, "assigned a subordinate status and the authority exercised by men over women results in a general oppression of women", their political protest and activism may not always manifest themselves in the same way as men.²⁹⁷ Similar caution is evident in the UK gender-guidelines,²⁹⁸ which lists the following examples of political activities carried out within the cultural confines of the 'private sphere' as roles assigned to women: providing community service, food, clothing, medical care, hiding people and passing messages from one person to another.²⁹⁹ Thus, decision-makers are encouraged to accept that while these activities are not 'traditionally' recognised forms of male political

²⁹⁴ *Ibid*, at 1379.

²⁹⁵ Macklin, *supra* note 2, at 53.

²⁹⁶ *Ibid*, at 53. *See also*, INS Gender Guidelines, *supra* note 5, at 11; CIRB Gender Guidelines, *supra* note 3, Section A.2; UK Gender Guidelines, *supra* note 8, Section 3.19; Home Office *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 12. Per some leading experts, not only can political opinion be labelled feminist, political opinion would also be the preferred choice where the laws or practices in question are, "putatively justified not by religion but by culture. *See*, Macklin, *supra* note 2, at 54.

²⁹⁷ CIRB Gender Guidelines, *supra* note 3, Section A.2.

²⁹⁸ UK Gender Guidelines, *supra* note 8, Section 3.22. *See also*, Home Office *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 12, which states that, "Whilst many women will be involved in such conventional political activities and raise similar claims this does not always correspond to the reality of the experiences of women in some societies. The gender roles in many countries mean that women will more often be involved in low level political activities, for instance hiding people, passing messages or providing community services, food, clothing or medical care. Decision-makers should beware of equating so-called "low-level" political activity with low risk. The response of the state to such activity may be disproportionately persecutory because of the involvement of a section of society, namely women, where because of their gender it is considered inappropriate for them to be involved at all".

²⁹⁹ *Ibid*; UK Gender Guidelines, *supra* note 8, Section 3.23; CIRB Gender Guidelines, *supra* note 3, Section A.2 (see in particular the 2003 *Compendium of Decisions: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update*, *supra* note 3, which provides a number of cases detailing these particular forms of 'private' political activities by women.). *See generally*, Greatbatch J, "The Gender Difference: Feminist Critiques of Refugee Discourse" 1 International Journal of Refugee Law 518, (1989).

activity/opposition, the cultural contexts in which these “activities are performed makes them political, regardless of whether they are inherently political”.³⁰⁰

According to Macklin, the US takes a far more expansive view of political opinion than Canada or the UK.³⁰¹ For example, in *Lazo-Majano*, as discussed earlier the Ninth Circuit ruled that a Salvadoran woman who had been beaten, enslaved and raped by her military official employer, had been persecuted on account of her political opinion. The court determined that her employer was, “asserting the political opinion that a man has a right to dominate”.³⁰² It further concluded that he had persecuted the claimant, “to force her to accept his opinion without rebellion”.³⁰³ Her employer although he knew that his victim held no such opinions, threatened to accuse her of being a political subversive if she resisted him.³⁰⁴ He used this threat to ensure her silence. Arguably, the court’s analysis was designed to overcome the assertion that the harm inflicted on the claimant was simply ‘personal’, and thus it strained to find that she had a political opinion in relation to the Salvadoran Government.³⁰⁵ It would not suffice to suggest that the nexus to the Convention ground was the persecutor’s political opinion regarding the role of women because, as the US Supreme Court determined in 1991, the persecution must be, “on account of the victim’s political opinion, not the persecutors”.³⁰⁶ The INS gender-guidelines do not elaborate on the potential scope of political opinion in relation to gender-based claims. However, it should be noted that following the promulgation of the INS Gender Guidelines in 1995, US immigration law was amended to compel the recognition

³⁰⁰ UK Gender Guidelines, *supra* note 8, Section 3.23 & Home Office *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 8, at 12. For instance, posting posters is not inherently political, but will be if, for example, they support a particular party or cause, similarly cooking food is not inherently political, but if it is part of or supportive of Trade Union activities, such an activity becomes inherently political.

³⁰¹ Macklin, *supra* note 2, at 54.

³⁰² *Lazo-Majano*, *supra* note 182, at 1435.

³⁰³ *Ibid.*

³⁰⁴ Macklin, *supra* note 2, at 54.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*, at 54-5. *See also*, INS Gender Guidelines, *supra* note 5, at 10 (referring to *INS v Elias-Zacarias*, 112 S.Ct. 812 (1991)).

of forcible sterilization and abortion as persecution on account of political opinion.³⁰⁷ The legislation did not articulate what the political opinion consisted of.³⁰⁸

Domestic violence is one of the most evident examples of women's powerlessness within the private sphere. A divergence appears to be emerging with respect to the treatment of domestic violence in each of my respective case-studies within the RDP. Whilst Canada and the UK tend to link domestic violence to membership in a PSG, within the US, in addition to this ground some decision-makers have also used the ground of political opinion. To appreciate the implications of these competing approaches, the following section will describe and compare them.

2. Membership in a PSG

In its guidelines on Membership in a PSG, the UNHCR defines a PSG as being:

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.³⁰⁹

This definition includes characteristics which are historical and as a result cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the individual, or are an expression of fundamental human rights.³¹⁰ Furthermore, if a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental,

³⁰⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. NO. 104-208, sec. 601, § 101(a)(42), 110 Stat. 2009-546, 3009-689. Section 601(a) of the Act effectively amended the refugee definition by adding the following:

"For the purposes of determination under (the Immigration and Nationality) Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control programme, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to prosecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion". Ibid.

³⁰⁸ Macklin, *supra* note 2, at 55.

³⁰⁹ UNHCR, PSG Guidelines, *supra* note 30, para 11.

³¹⁰ *Ibid*, para 12.

further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.³¹¹

It should be noted, however, that a PSG, “cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted”.³¹² Nonetheless, persecutory action towards a group may be a relevant factor in determining the visibility of a group in a particular society.³¹³ Also a fundamental human right can constitute a unifying characteristic of a social group if a society regards those persons as a group because of their common right to exercise a specific human right.³¹⁴ Further, there is no requirement to prove that every member of the group has a well-founded fear of persecution in order to establish a PSG in accordance with the Refugee Convention.³¹⁵ Moreover there is no requirement that the group be cohesive,³¹⁶ or that the size of the group be a relevant consideration in determining whether a PSG exists.³¹⁷

Finally, it should be noted that mere membership of a PSG, “will not normally be enough to substantiate a claim for refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.”³¹⁸ Also, one or more Convention grounds may overlap with each other, depending on the circumstances of each individual case.³¹⁹

A. Women as a PSG³²⁰

³¹¹ *Ibid*, para 13.

³¹² *Ibid*, para 14.

³¹³ See also, UNHCR Summary of Conclusions, *supra* note 285, no.6.

³¹⁴ Luopajarvi, *supra* note 137, at 27. See also, Aleinikoff, *supra* note 285, at 293-4 (quoting *Applicant A v MIMA*, para 246).

³¹⁵ Aleinikoff, *supra* note 285, at 288. See also, UNHCR, PSG Guidelines, *supra* note 30, para 17; UNHCR Summary of Conclusions, *supra* note 285, no.7.

³¹⁶ UNHCR, PSG Guidelines, *supra* note 30, para 15; UNHCR Summary of Conclusions, *supra* note 285, no.4.

³¹⁷ UNHCR, PSG Guidelines, *supra* note 30, para 18-19.

³¹⁸ UNHCR Handbook, *supra* note 234, para 79; UNHCR, PSG Guidelines, *supra* note 30, para 16.

³¹⁹ UNHCR Handbook, *supra* note 234, para 77; UNHCR Summary of Conclusions, *supra* note 285, no.3.

³²⁰ These comments aim at identifying the current, gender-sensitive interpretation. As the development of the concept has received considerable attention elsewhere those issues will not be considered here. See, Neal, *supra* note 9; Fullerton M, “A comparative look at refugee status based on persecution due to membership in a particular social group”, 26 Cornell Journal of International Law 3 (1993), at 55; Kelly N, “Gender-related persecution: assessing the asylum claims of women”, 26 Cornell Journal of International Law 626 (1993), at 625; Macklin, “Refugee Women and the Imperative of Categories”, *supra* note 248.

According to Hathaway, gender-based groups are typical examples of “social subsets” defined by an innate and unchangeable characteristic.³²¹ As women are identified as a group in society, they are often subject to different treatment and standards in some countries.³²² In accordance with the UNHCR’s definition of a PSG, ‘women’ both share a common characteristic (their gender), which is both innate and unchangeable, and are usually perceived as a group by society. The UNHCR Executive Committee recognised already in 1985 that women fleeing persecution may be considered as a PSG.³²³ The Executive Committee reiterated this position in 1993 in relation to persecution through sexual violence.³²⁴ In its recent guidelines on membership of a PSG, the UNCHR states that sex falls within the ambit of the social group category, “with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently from men”.³²⁵

Arguably, as there is no cohesiveness requirement in the UNHCR definition of a social group, women may therefore constitute a PSG under certain circumstances, whether or not they associate with one another based on that shared characteristic.³²⁶ Occasionally the size of a social group has been used as a reason for not recognising ‘women’ as constituting a social group.³²⁷ The UNCHR PSG guidelines have ended this restriction and state that, “the purported size of the social group is not a relevant criterion in determining whether a PSG exists”.³²⁸ The UNHCR also notes that even though ‘women’ have been recognised as a PSG, this does not mean that all women would be eligible for refugee status;³²⁹ a claimant must naturally fulfil all the other criteria in the refugee definition.

³²¹ Hathaway, “*The Law of Refugee Status*”, *supra* note 239, at 162.

³²² UNHCR Gender Guidelines, *supra* note 14, para 30.

³²³ “States are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘PSG’ within the meaning of Article 1A(2)” of the Refugee Convention”. See, Executive Committee Conclusion No. 39 (XXXVI) – 1985 Refugee women and international protection, UN doc. A/AC.96/673, para. 115(4), para. (k).

³²⁴ UNHCR Exec. Comm., Conclusion No. 73 Refugee Protection and Sexual Violence, para e., (1993), reprinted in UNHCR, *A Thematic Compilation of Executive Committee Conclusions on International Protection* (4th ed. 2009), para 21 (d).

³²⁵ UNHCR, PSG Guidelines, *supra* note 30, para 12.

³²⁶ *Ibid*, para 15; UNHCR Gender Guidelines, *supra* note 14, para 31.

³²⁷ Luopajarvi, *supra* note 137, at 29.

³²⁸ UNCHR PSG Guidelines, *supra* note 30, para 18; UNHCR Gender Guidelines, *supra* note 14, para 31.

³²⁹ UNCHR PSG Guidelines, *supra* note 30, para 19.

1. Canada

In considering the application of the ‘membership in a PSG’ category, the CIRB gender-guidelines encourage decision-makers to refer to the Supreme Court of Canada decision in *Ward*³³⁰ which formulated its understanding of a PSG. Prior to the decision, the PSG category had been considered in a few Federal Court cases, including *Mayers*³³¹ and *Cheung*.³³² In *Ward*, the Supreme Court recognised that a PSG may constitute: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.³³³ The court listed gender as an example of such a characteristic.³³⁴ Unfortunately, the CIRB gender-guidelines contain no further practical guidance on whether or how to identify or define a gender-based social group.

In 1995 the Supreme Court again had the opportunity to elaborate on their understanding of membership of a PSG. In a split decision in *Chan*³³⁵ a case concerning forced sterilization, the majority determined that the claimant did not meet the burden of proof regarding well-founded fear of persecution, and refrained from addressing the social

³³⁰ *Ward v. Canada (Attorney General)*, SC (CA) 30 Jun. 1993, 2 S.C.R. [1993] 689. See also, CIRB Gender Guidelines, *supra* note 3, Section A. 3.

³³¹ *Canada (MEI) v. Marcel Mayers*, FC (CA), 5 Nov. 1992, [1993] 1 FC 154 (C.A.). Mayers concerned a woman from Trinidad and Tobago who had been abused and raped by her husband. The Federal Court held that ‘Trinidadian women subject to wife abuse’ was a PSG. A ‘PSG’ was defined as “(1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness and solidarity, or (4) sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it.”

³³² *Cheung v. MEI*, FC (CA) [1993] 2 FC 314 (C.A.). Applying the test proposed in *Mayers* the Federal Court held that women in China who have more than one child and are faced with forced sterilization constituted a PSG.

³³³ *Ward*, *supra* note 330, at 739.

³³⁴ The court noted that the first category “would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of the anti-discrimination influences, in that one's past is an immutable part of the person”. *Ibid.*, at 739.

³³⁵ *Chan v. Canada (MEI)*, SC (CA) 19 Oct. 1995, 3 S.C.R. [1995] 593.

group question. In his dissent, Justice, La Forest did, however, elaborate on the question of membership of a PSG and clarified the reasoning in *Ward*:³³⁶

a refugee alleging membership in a particular social group does not have to be in a voluntary association with other persons similar to him- or herself. Such a claimant is in no manner required to associate, ally, or consort voluntarily with kindred persons. The association exists by virtue of a common attempt made by its members to exercise a fundamental right.³³⁷

Thus, the association in this case was so fundamental that the claimant could not be required to forsake it, and the claimant was found to be a member of a PSG.

As gender is an innate characteristic, ‘women’ as well as sub-groups of women may constitute a PSG.³³⁸ Such subgroups according to the CIRB gender-guidelines may be identified by reference to characteristics, in addition to gender, which may also be innate or unchangeable, such as age, race or marital or economic status.³³⁹ Examples of social groups identified by Canadian jurisprudence relevant to gender-related claims include the family; homosexuals (sexual orientation); women subject to domestic abuse; women forced into marriage without their consent; women subject to FGM; women subjected to forced sterilization; and educated women.³⁴⁰ It should be noted that even though a social group cannot be defined solely by the fact that a group of persons is subject to persecution,³⁴¹ social groups have been defined through gender and the feared persecution, for example, as ‘women subject to circumcision’.³⁴² The CIRB gender-guidelines clarify this issue by stating that a group is not considered to be “defined solely

³³⁶ In particular, the dissent discussed the second category of social groups, namely, voluntary associated groups, and held that the right of a person or a couple to freely decide the number, spacing and timing of their children was a fundamental human right, and that parents asserting their right to have more than one child formed an association. Although made in dissent, Justice La Forest’s comments on the social group issue were joined by two other Court members and were not contradicted by the majority. It should also be recalled that *Ward* was an unanimous judgment. See, Daley K & Kelley N, “*Particular social group: A human rights based approach in Canadian Jurisprudence*”, 12 International Journal of Refugee Law 148 (2000), at 151.

³³⁷ Chan, *supra* note 335, dissent per La Forest, at 643-46.

³³⁸ Luopajarvi, *supra* note 137, at 88.

³³⁹ *Ibid.* See also, CIRB Gender Guidelines, *supra* note 3, Section A.3: Application of the Statutory Ground.

³⁴⁰ Luopajarvi, *supra* note 137, at 88-9. See also, Interpretation of the Convention Refugee Definition in the Case Law, Legal Services—Immigration and Refugee Board, 31 Dec. 2002, (hereafter IRB Interpretation), at 4-6 & 4-9, as cited in Luopajarvi, *supra* note 137, at 89, note 422.

³⁴¹ *Ward*, *supra* note 330, at 729-33.

³⁴² Luopajarvi, *supra* note 137, at 89.

by common victimisation if the claimant's fear of persecution is also based on her gender, or on another innate or unchangeable characteristic".³⁴³

2. UK

*Islam and Shah*³⁴⁴ was the first case concerning the construction the PSG ground to reach the UKHL.³⁴⁵ In this case the UKHL determined that a PSG comprises of a group of individuals who share a common, immutable characteristic that is either beyond the power of a person to change, or is so integral to the individual's identity that it ought not to be required to be altered.³⁴⁶ The Court further stated that it was not required that a PSG should possess a component of cohesiveness—even though cohesiveness might prove the existence of a PSG.³⁴⁷ Therefore, the PSG phrase applies to groups falling within the Refugee Convention's anti-discriminatory objectives. Thus, women who live in countries, which discriminate against them on the grounds of sex, can constitute such a group.³⁴⁸ Consequently, the claimants, two Pakistani women who had been subject to domestic

³⁴³ CIRB Gender Guidelines, *supra* note 3, at Section A.3.

³⁴⁴ See, *Islam & Shah*, *supra* note 247, as reprinted in 11 International Journal of Refugee Law 3 (1999), at 496. See also *Islam & Shah* in the Court of Appeals, [1998] 1 WLR 74; [1997].

³⁴⁵ Before 1999 the UK Court of Appeals had considered the question of how a PSG should be construed for the first time in *Savchenkov*. In that case the Court of Appeal accepted that 'membership of a PSG' should be interpreted *esjudem generis*, and that the concept of 'PSG' must have been intended to apply to social groups which exist independently of persecution. See, *Savchenkov v. SSHD*, (1996) Imm. AR 28, at 34. See also, *Lazarevic v. SSHD*, CA (UK), [1997] Imm AR 251, where the Court of Appeals held that 'PSG' must be construed *esjudem generis* with the other Convention grounds but there is no requirement that the social group must possess a civil or political status in order to be recognised as a social group. Vidal M, "Membership of a particular social group" and the effect of *Islam and Shah*", 11 International Journal of Refugee Law 528, (1999), at 532.

³⁴⁶ Luopajarvi, *supra* note 137, at 89.

³⁴⁷ *Ibid* at 89-90. *Islam & Shah*, per Lord Steyn, and Lord Hoffmann, *supra* note 247, International Journal of Refugee Law, at 501-503; 511-12 respectively. See also comments by Goodwin-Gill G, "Judicial reasoning and 'social group' after *Islam and Shah*", 11 International Journal of Refugee Law 537, (1999) at 538.

³⁴⁸ *Islam & Shah*, per lord Steyn, and Lord Hoffmann, *supra* note 247, International Journal of Refugee Law, at 503; 511-12 respectively. See also, Vidal, *supra* note 345, at 533. The emphasis on the principles of non-discriminatory has been criticised. For example, Goodwin-Gill has expressed fears that the non-discrimination argument may be unnecessarily limiting. Goodwin-Gill, "Judicial Reasoning", *supra* note 347, at 538-39. See also judgment per Auld LJ in *Skenderaj v. SSHD*, *supra* note 261, paras. 19, 23-27, where he questions the relevance of non-discrimination considerations in cases of persecution by non-state actors. He states that "it is not necessary to insist upon discrimination as a defining element of a particular social group to satisfy [...] that the latter must exist independently of, and not be defined by, persecution." (para. 27) In addition, see judgment by the High Court of Australia in *Chen Shi Hai v. MIMA*, (2000) 201 CLR 293.

violence and accused of adultery, had a well-founded fear of persecution for reasons of their membership in the PSG ‘Pakistani women’.³⁴⁹ Furthermore, the UKHL determined that a PSG must exist independently from the persecution claimed. However, it was also held that the actions of the persecutors may serve to identify or even cause the creation of a PSG in society.³⁵⁰

Affirming the *Islam and Shah* determination, the UK gender-guidelines state that a PSG will exist where “a group of individuals with a particular characteristic are recognised by society as being different from others in the society”.³⁵¹ According to the guidelines, whether that will be the situation will depend on the evidence and the factual situation in the particular country of origin.³⁵² Thus, the society of a country of origin, the acts of persecutors as well as other external factors have a role in defining, identifying and even causing the creation of a PSG.³⁵³ As examples of relevant particular characteristics (innate, unchangeable or such that a person should not be required to change them) the guidelines include gender, age, race, marital status, family, kinship ties, sexual orientation, economic status and tribal or clan affiliation.³⁵⁴ Furthermore, the

³⁴⁹ Lords Steyn, Hope of Craighead and Hoffman favoured the broader formulation of ‘Pakistani women’. Lord Steyn also held in the alternative that the group consisted of ‘Pakistani women accused of transgressing social mores and who are unprotected by their husbands or other male relatives’. Lord Hutton concurred with Lord Steyn’s alternative, narrower group, and Lord Millet dissented and would have dismissed the appeals.

³⁵⁰ Luopajarvi, *supra* note 137, at 90. *See also*, *Islam & Shah*, per Lord Steyn, *supra* note 247, International Journal of Refugee Law, at 504-505. Lord Steyn cited with approval the Australian case of *A v. MIEA*, 142 ALR 331, 359 (McHugh J.). *See also*, *Yake v. SSHD*, IAT 19 Jan. 2000, UK IAT 00TH00493. The PSG was held to be “Yopougou women who may be subject to FMG”.

³⁵¹ UK Gender Guidelines, *supra* note 8, section 3.35. *See also*, Home Office Asylum Policy Instruction: *Gender Issues in the Asylum Claim*, *supra* note 8, at 11 (noting the *Islam and Shah* approach and encouraging decision-makers to follow this approach which has been identified by the European Council Directive (2004/83/EC) of 29th April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the content of the protection granted. This Directive has been transposed into UK law through the Refugee or Person in need of International Protection (Qualification) Regulations 2006 – “Qualification Regulations” – and changes to the immigration rules, and will apply to all asylum and human rights claims from 9 October 2006).

³⁵² *Ibid*, at 10 (“A definition of what constitutes a PSG is provided in the Qualification Regulations, which state that: “A group shall be considered to form a particular social group where, for example: (1) Members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and (2) That group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.” *See also*, UK Gender Guidelines, *supra* note 8, section 3.36.

³⁵³ *Ibid*, section 3.37.

³⁵⁴ *Ibid*, section 3.39; Home Office Asylum Policy Instruction: *Gender Issues in the Asylum Claim*, *supra* note 8, at 11. *See also*, Luopajarvi, *supra* note 137, at 90.

guidelines note that whether such factors are unchangeable depends on the social and cultural context in which the woman lives, as well as of the perception of the agents of persecution and those responsible for State protection.³⁵⁵

3. US

In 1985 the BIA in *Acosta*,³⁵⁶ described a PSG as a group of individuals who share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The court further determined that the characteristic must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.³⁵⁷ In *Sanchez-Trujillo*, decided a year later, the Ninth Circuit took a different approach and determined that a PSG implied:

a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among purported members, which imparts some common characteristic that is fundamental to their identity.³⁵⁸

According to Luopajarvi, since the Sanchez-Trujillo decision US practice on the social group issue has been divided into two streams, with the BIA and the vast majority of Circuit Courts of Appeals following *Acosta*, and the minority of Circuit Courts following

³⁵⁵ UK Gender Guidelines, *supra* note 8, section 3.39. The Asylum Policy Instruction: *Gender Issues in the Asylum Claim*, *supra* note 8, also states that, “whether a PSG exists will depend on the conditions in the ‘society’ from which the applicant comes”. *Ibid*, at 11.

³⁵⁶ *Acosta*, *supra* note 211.

³⁵⁷ The formulation in *Acosta* has had a considerable influence of the understanding of the phrase ‘PSG’ in many other jurisdictions. *See for example*, *Ward*, *supra* note 330, and *Islam & Shah*, *supra* note 247. *See also*, *Matter of Kasinga*, where the BIA applying the criteria for defining a PSG set down in *Acosta*, held that a “particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities.” Thus, the BIA found that the applicant was a member of a PSG consisting of young women members of a certain tribe who had not undergone FGM, and who opposed the practice. *In re Kasinga*, BIA 13 Jun. 1996, Interim decision no. 3278, (21 I & N dec. 357), at 10.

³⁵⁸ *Sanchez-Trujillo v. INS*, CA (US) 2nd Cir., 801 F.2d 1571 (1986).

Sanchez-Trujillo.³⁵⁹ However, in 1999, the BIA held in the *Matter of R.A.* that the immutable or fundamental characteristic-criterion was only a threshold, and that an additional criteria must be demonstrated in order to fall under the social group category—namely that group members “understand their own affiliation with the grouping, as do other persons within the particular society” and the suffered harm is “itself an important societal attribute”.³⁶⁰ As already discussed, the decision was originally vacated by the BIA and the INS issued proposed rules on interpreting the refugee definition. They restate the *Acosta* PSG definition.³⁶¹ The commentary to the rules affirms that gender is “clearly such an immutable trait” and that membership of a social group cannot be defined by the persecution suffered.³⁶²

Irrespective on what the fate of the proposed rules is, it should be noted that the Ninth Circuit Court of Appeals seems to have revised its position on the social group issue. In its decision in *Hernandez-Montiel*,³⁶³ which concerned a young homosexual Mexican with a female gender identity, the Court noted that the US case-law on the issue “is not wholly consistent” and held that its decision in *Sanchez-Trujillo* should be interpreted as consistent with the *Acosta* test and that the so called voluntary association test is an alternative basis for establishing membership in a PSG.³⁶⁴ Referring to the INS proposed rules, the Court reaffirmed this approach in *Aguirre-Cervantes*, and found that the claimant had been persecuted by her father for reasons of her membership in a PSG, namely her family.³⁶⁵

³⁵⁹ Luopajarvi, *supra* note 137, at 92. See also, Aleinikoff, *supra* note 285, at 275-280. See also, *Geovanni Hernandez-Montiel v. INS*, CA (US) 9th Cir., 24 Aug. 2000, 225 F.3d 1084, as reprinted in 12 International Journal of Refugee Law 4 (2001), 608, 615, as cited in Luopajarvi, *supra* note 137, at 92, note 436.

³⁶⁰ *In re R.A.*, BIA 11 Jun. 1999, Interim dec. no. 3402. The decision was subsequently (2001) overturned by the Attorney General (Janet Reno) and remanded to the BIA for reconsideration until after the adoption of the INS proposed rules (65 Fed. Reg. 76588, 7 Dec. 2000). No decision as already discussed has yet been taken in the case. See also, Schaffer H, “Domestic violence and asylum in the United States: *In re R-A*” 95 Northwestern University Law Review 779, (2001); Binder A, “Gender and the “membership in a particular social group” category of the 1951 Refugee Convention”, 10 Columbia Journal of Gender and Law 167, (2001).

³⁶¹ Luopajarvi, *supra* note 137, at 92. See also, R-A Rule, *supra* note 199, Section 208.15(c)1.

³⁶² *Ibid.* Sections 76593-76594. It is also important to note that the rules include a list of factors that may be considered in determining whether a social group exists, but which are not necessarily determinative. These factors are largely inspired by *Sanchez-Trujillo* and *Matter of R.A.* Luopajarvi, *supra* note 137, at 92.

³⁶³ *Geovanni Hernandez-Montiel v. INS*, *supra* note 359, as reprinted in 12 International Journal of Refugee Law 608, (2001), at 614.

³⁶⁴ *Ibid.*, at 615. Luopajarvi, *supra* note 137, at 93.

³⁶⁵ *Aguirre-Cervantes*, *supra* note 278, at 593. The *Aguirre-Cervantes* case was, however, subsequently vacated per stipulation and remanded to the BIA (*Aguirre-Cervantes v. INS*, 270 F.3d 794, 9th Cir. 2001;

While the examined gender guidelines attempt to be comprehensive in their treatment of the relevance of gender, certain significant omissions remain that could undermine the cases of genuine claimants. These omissions recollected below in Table 1 have exposed bigger issues which need to be addressed within the RDP. Like many other events in human experience, refugee determination is a process in which the subject's agency is subordinated to the definitional power of others. Nevertheless, these guidelines are merely a template upon which one can devise a model tailored to the particular jurisdiction in which it will operate. Ultimately, by remedying the flaws inherent within the guidelines and learning from the protective processes implemented within specialised domestic violence courts, the RDP can be more inclusive and accommodating of the needs of claimants.

Table 1: Deficiencies of the Examined Gender-Guidelines

UK Gender Guidelines	INS Gender Guidelines	CIRB Gender Guidelines
Administrative Directive	Administrative Directive	Administrative Directive
Non-Binding on Decision Makers	Non-Binding on Decision Makers	Non-Binding on Decision Makers
Approach must abide by the jurisprudence of their respective higher courts	Approach must abide by the jurisprudence of their respective higher courts	Approach must abide by the jurisprudence of their respective higher courts
Advocates tend to stereotype claimant's to easily fit the categories of the guidelines	Guidelines apply explicitly to asylum officers. Immigration Judges and the BIA are not formally subject to the Guidelines, although they may	Guidelines apply only to the members of the IRB

273 F.3d 1220, 9th Cir. 2001), as Aguirre-Cervante's father was found dead in Mexico in December 2001. The BIA will hear the case again, but as the source of persecution does not exist anymore, the claim may be moot. See, Daugherty M, "The Ninth Circuit, the BIA, and the INS: The shifting state of the particular social group definition in the Ninth Circuit and its impact of pending and future cases", 41 Brandeis Law Journal 631, (2003), at 653.

	choose to be guided by them	
Decision-makers need to be continually trained on issues	Acknowledgement and treatment of international law is very perfunctory	Do not apply to the overseas selection process
Guidelines only apply to inland claims	Do not apply to the overseas selection process	The Guidelines do not focus on the actual conduct of decisionmakers in the hearing room
UK gender-guidelines were effectively withdrawn. Asylum case owners in the UK Border Agency, are advised to consider the UK Border Agency's asylum policy instructions	The Guidelines offer no constructive alternative to proceeding with whomever the claimant has brought, stating that "interviews should not generally be cancelled and rescheduled because women with gender-based asylum claims have brought male interpreters"	The Guidelines do not address whether gender-related claims should be conducted with all-female personnel, including interpreters
Resist labelling gender-specific practices as persecutory which relate to sexist laws or policies that apply to all women.	Designate domestic violence to be both "private action" and "a form of persecution"	Resist labelling gender-specific practices as persecutory which relate to sexist laws or policies that apply to all women.
Information on the use and collection of documentation about country conditions is generic	Domestic Violence is inadequately designated as form of persecutory harm	Information on the use and collection of documentation about country conditions is generic
Inconsistent treatment of apparently similar cases is one of the most conspicuous weaknesses of refugee determination in the UK, and features prominently in the jurisprudence around domestic violence and state protection	The Guidelines do not explicitly identify international human rights instruments as aids to defining persecution. Instead, they rely on American caselaw interpreting the term "persecution"	Inconsistent treatment of apparently similar cases is one of the most conspicuous weaknesses of refugee determination in Canada, and features prominently in the jurisprudence around domestic violence and state protection

Variation in the assessment of state protection in situations of domestic violence	Resist labelling gender-specific practices as persecutory which relate to sexist laws or policies that apply to all women.	Variation in the assessment of state protection in situations of domestic violence
Do not add gender as an enumerated ground of persecution	Information on the use and collection of documentation about country conditions is generic	Do not add gender as an enumerated ground of persecution
Drafted at a fairly high degree of generality, and in language that is always equivocal enough to avoid the appearance of fettering the discretion of decisionmakers	Inconsistent treatment of apparently similar cases is one of the most conspicuous weaknesses of refugee determination in the US, and features prominently in the jurisprudence around domestic violence and state protection	Contain no substantive practical guidance on whether or how to circumscribe a gender-based PSG
Offer no constructive alternative to proceeding with male interpreters and other personnel	The Guidelines provide little information about state protection that applies to the situation of domestic violence	Do not examine the PSG category in the context of domestic violence
Domestic Violence is inadequately designated as form of persecutory harm	The Guidelines do not address evidentiary issues regarding state protection or the standard of "adequacy" that citizens are entitled to expect	Provide little direction and invite inconsistency in respects of defining women as a PSG
	Do not add gender as an enumerated ground of persecution	Drafted at a fairly high degree of generality, and in language that is always equivocal enough to avoid the appearance of fettering the discretion of decisionmakers
	Silent on the intersection of race and gender	Advocates tend to stereotype claimant's to easily fit the categories of the guidelines
	The Guidelines do not discuss nationality as a	Decision-makers need to be continually trained on issues

	ground of persecution in a gender context	
	The Guidelines do not articulate religion as a ground of persecution in such cases, but rather incorporate it into the definition of persecution	
	The Guidelines do not elaborate on the potential scope of political opinion in relation to gender claims	
	Do not examine the PSG category in the context of domestic violence	
	Proffers different opinions on whether and how gender may form the basis of social group ascription	
	Drafted at a fairly high degree of generality, and in language that is always equivocal enough to avoid the appearance of fettering the discretion of decisionmakers	
	Rely heavily on restating existing jurisprudence from American source	
	Advocates tend to stereotype claimant's to easily fit the categories of the guidelines	
	Decision-makers need to be continually trained on issues	

Conclusion

The INS, CIRB and UK Gender-Guidelines represent innovative initiatives by States to address the specificity of women's experiences of persecution within the context of the archaic definition of "refugee" promulgated at the 1951 Refugee Convention. The UNHCR certainly took the lead in promoting gender awareness, however, the normative influence of the UNHCR, on account of having no formal authority regarding the interpretation of the refugee definition by States, has not been directly translated into action at the domestic level. Whilst, the international movement for recognition of women's rights as human rights engendered attention to refugee women by the UNHCR, which the UNCHR in turn diffused to States Party, it is probably the perceived success (or failure) of the guidelines, as seen through the lens of domestic political concerns, that has generated much discussion.

The gender-guidelines examined in the thesis may appear as final solutions to the difficulties surrounding the application of the Refugee Convention to the specific needs of FGM and other claimants of gender-based violence. They are not, and reform is needed. It has been said that identifying an issue of concern and formulating a response rarely solves a problem and can actually expose a deeper set of issues that might not have come to the fore but for the fact that the initial response cleared enough conceptual space to problematize those deeper issues.³⁶⁶ This is exactly what this chapter has done. It has shown that whilst a welcome development, the examined gender-guideline, are not comprehensive and have left several issues unaddressed.³⁶⁷ Whilst the guidelines attempt to address the issue of gender-based persecution within the RDP, they have also unconsciously exposed States unwillingness to truly condemn certain practices. The treatment (or lack thereof) of domestic violence in the guidelines furnishes one example of these limitations. Each has been drafted very generally, and in language that is always equivocal enough to avoid the appearance of fettering the discretion of judges.³⁶⁸ Thus,

³⁶⁶ Macklin, *supra* note 2, at 69.

³⁶⁷ As noted by Wairimu Karago, Deputy Director, Division of International Protection, UNHCR, in Bissland J & Lawand K, "Report of the UNHCR Symposium on Gender-Based Persecution" 9 International Journal of Refugee Law 13, (1997), at 22.

³⁶⁸ *Ibid.*

some commentators argue, to the extent that the INS Gender Guidelines rely heavily on restating existing jurisprudence from American sources, issues that have sparsely been considered by the courts, such as domestic violence, receive relatively little attention.³⁶⁹ Furthermore, the advice offered by the UK and CIRB gender-guidelines in relation to domestic violence is so vague (and confusing at times) so as to provide little by way of concrete guidance.³⁷⁰ Moreover, several key questions - what is the nexus to the definition in cases of domestic violence? What are the criteria for assessing the ability or willingness of the state to protect? What constitutes adequate protection? - remain unacknowledged and unaddressed. As discussed in this chapter and Chapter One, I do not agree with the use of political opinion in domestic violence cases, but it is understandable that legal advocates will employ such strategies if they are likely to produce a favorable outcome. The INS gender-guidelines, through their retrospective focus on established jurisprudence, “miss the opportunity to suggest new alternatives that may be preferable both in theory and practice”.³⁷¹ The consequence is that political opinion, within the context of the PSG will become more entrenched and used as the main vehicle of choice in determining such claims within the US.

Similarly, while each of the guidelines addresses the issue of State protection, such an issue arguably is far too complex to adequately address in administrative guidelines. Furthermore, in the context of FGM, one of the biggest problems is the absence of any standard against which to assess the ability/willingness of the State to protect women. Whilst the standard of ‘due diligence’ as set out in CEDAW may be used, States (including the case-studies) still need to take seriously harms inflicted on women within the private sphere. If one subscribes to the view that women occupy a subordinate status to a greater or lesser degree all over the world, there is arguably no exact standard against one might measure the adequacy of protection in a particular State unless one resorts to the (mistaken) belief that Western States adequately protect women from such forms of violence.³⁷² Whilst it might be useful for decision-makers to turn their search for guidance back to the international arena this is not mandatory and States do not have to endorse

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

³⁷² *Ibid.*, at 69-70.

such ideas. Such instruments could potentially help to fill the gaps inherent within the gender-guidelines.

However, despite the influence of the UNHCR, regardless of how committed activists, researchers, and interested parties are, and however good or bad the guidelines, nothing counts unless decision-makers within the actual RDP open their hearts and minds to the women who have risked all to flee their home and seek refuge in a new country. The success of the guidelines should be judged solely by the extent to which they enhance decisionmakers' ability to genuinely listen to the stories of women who are persecuted as or because they are women and hear them as the stories of refugees. The FGM caselaw in chapter three, shows that this is not the case and claimants are continually being let down by a system supposedly intended to protect them. For instance, the fact that the gender-guidelines are not binding on the courts and decision-makers severely affects their effectiveness. For instance, if States restructured their RDP, newly-established bodies can choose to ignore any guidelines implemented by their predecessors. Thus, the withdrawal of the IAT in 2005 of the UK gender-guidelines implemented by the IAA reinforces this point and the ability to remove such innovative and essential guidelines instils a lack of confidence that gender is understood and prioritised within the RDP.

Moreover, unless decision-makers come to the process with an open and unbiased mindset, then the process will remain inherently prejudiced and futile. The gender bias and marginalization of women's experiences within the refugee context is an immensely complex issue. The application of refugee law and the 1951 refugee definition itself remains constrained firstly by its founding interest to protect educated male elite claimants and secondly the influence of cultural relativism, which ultimately misconstrues FGM and other gender-based forms of violence against women as private issues, unrelated to the larger political and social structure which serve to maintain their subordinate status.³⁷³ As discussed in Chapter One, race and racism may also play a significant role in how refugee claims are heard and decided, and as decision-makers are not accountable for failing to implement the guidelines, this convergence of racial and gender stereotypes, playing out in the language of 'culture', creates a serious obstacle for gender-based

³⁷³ Sinha, *supra* note 10, at 1574-8.

refugee claims. Coupled with the prejudices of individual decision-makers, the likelihood of women fleeing FGM being denied refugee protection remains considerable.

The FGM jurisprudence emanating from the case-studies, highlights the inconsistent application of the 1951 Refugee Convention definition in affording protection to women. It further, reinforces the weaknesses and general ineffectiveness of the use of existing gender-guidelines. Even though FGM, has been recognised as a form of persecution giving rise to a claim for refugee status within the case-studies this does not mean that claimants are automatically or more likely to be granted refugee status. Whilst the legal arguments may have been won, the procedure for claiming refugee status, and the widely observed ‘culture of disbelief’ within the RDP makes the road to recognition as a refugee a very rocky one, which, as chapter three will now reveal, comparatively few succeed in traversing.

Chapter Three

Findings: Lip Service or Implementation – The Gender Guidelines as an Effective Remedy?

Introduction

Refugee determination is arguably the single most complex adjudication function in contemporary Western Societies.¹ This complexity stems from the need for the decision-maker to have sufficient knowledge of the social, cultural and political environment of the country of origin, a capacity to bear the psychological burdens of stories of persecution, and an ability to deal with the legal issues pertaining to the international refugee definition and the procedures of quasi-judicial hearings involving various pieces of evidence.² Herlihy and Turner have further argued that refugee determination is made difficult by arbitrary refugee policy, the lack of objective evidence available, and inconsistencies in the application of justice amongst decision-makers.³ Other factors, including the complexity of gender-based violence may also intersect to create additional layers of intricacy.

Gender, as already discussed, has typically been neglected in the interpretation of the 1951 Refugee Convention because it is not listed as one of the enumerated grounds of persecution. Consequently, women have been unable to benefit equitably from protection under the Refugee Convention. The reasons are two-fold, firstly procedural and evidential barriers prevent women's access to the RDP; and secondly, in interpreting the Refugee Convention, women's experiences have been marginalized. As discussed in Chapter Two attempts have been made to remedy this marginalization, the gender-guidelines being one such reform.

¹ Rousseau C, et al, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board", 15 *Journal of Refugee Studies* 43, (2002), at 43.

² *Ibid*, at 43-44.

³ Herlihy, J & Turner S, "Asylum Claims and Memory of Trauma: Sharing Our Knowledge" 191 *British Journal of Psychiatry* 3, (2007), at 3-4.

The aim of this chapter, therefore, is to present the findings drawn from an analysis of the FGM jurisprudence emanating from the case-studies. The elucidation of the findings will help determine, firstly, if the gender-guidelines have helped to redress the disparity in women's claims for refugee status and secondly, determine the extent to which their weaknesses impinge on the supposedly 'rectified' procedural and evidential barriers which have continuously undermined the fairness of decision-making in such cases.

An increasing number of individuals who reject FGM are seeking asylum in the West. This chapter identifies the legal hurdles claimants must surmount to be successful, and the various courts' assessments of claims. FGM claimants have great difficulty in engaging the Refugee Convention definition. Even though FGM constitutes persecution and can be linked to any of the Refugee Convention grounds,⁴ some claimants continue to be denied protection because it is claimed that they can evade FGM.⁵ Arguably, to ensure genuine claimants, receive protection it is vital that decision-maker gain an understanding of the cultural context of FGM but also of the situation of women in the country of origin in general. These factors need to be addressed within the already complex RDP.

⁴ In order to qualify for refugee status, a claimant must show that the persecution she fears is for reason of her race, religion, nationality, membership of a particular social group (PSG) or political opinion. Even though the most common Convention ground in connection with FGM claims is membership of a PSG, fear of FGM can be connected to all of these reasons. Since the definitions of race and nationality include ethnic group membership, it can be argued that persecution happens for reasons of belonging to an ethnic group affected by FGM. Where FGM is thought to be a religious requirement, or where the woman's religion prohibits FGM/C, there is a nexus to the Convention ground religion. Further, opposition to FGM can constitute a political opinion. Since FGM is a practice that affects only women and since women experience discrimination in their countries of origin, with FGM being an 'extreme expression of the discrimination' they can be said to belong to the PSG "women." This argument incorporates gender into the refugee definition. See, Rights in Exile Programme, *"Female Genital Mutilation/Cutting: Asylum Claims and Appeals"*, (2017). This document is available online via the International Refugee Rights Initiative Rights in Exile Programme at <http://www.refugeelegalaidinformation.org/female-genital-mutilationcutting-asylum-claims-and-appeals> (last accessed 11/6/17).

⁵ The suggested reasons mentioned for refusing claims based on FGM/C have been identified in research on asylum claims based on FGM/C made in the UK between 2000 and 2014, as well as on the experiences of Rights in Exile's co-director Barbara Harrell-Bond who serves as an expert witness on FGM/C in Sierra Leone. See, Rights in Exile Programme, *"Female Genital Mutilation/Cutting: Asylum Claims and Appeals"*, *supra* note 4; and Grundler M, *"The Protection of Asylum Seekers against Female Genital Mutilation in the UK"*, (2015), available online at https://www.gbz.hu-berlin.de/downloads/pdf/the_protection_of_asylum_seekers_against_fgm_in_the_uk_mbs_thesis_maja_grundler.pdf (last accessed 11/6/17).

Part I examines the FGM jurisprudence⁶ and the extent to which existing RDPs and the gender-guidelines are failing to adequately accommodate and protect victims. This examination reveals that unless the RDP itself is inclusive, accommodating and respectful of women's gender-based claims, interpretations of the guidelines and the Refugee Convention definition will continue to result in disparate outcomes irrespective of essential similarities between cases, and genuine claimants being denied protection. Part II examines the issue of credibility and finds that the gender-guidelines have not solved all the problems facing women seeking refugee status based on a claim of gender-based persecution with any finality. This section highlights several additional hurdles exposed by the FGM-jurisprudence which negatively affects decision-making and which needs further clarification and rectification within the domestic gender-guidelines and RDP itself. These additional hurdles pertain to the issues of cultural relativism and more specifically credibility assessments.

From the outset, it should be noted that whilst the interpretation of the FGM jurisprudence is subjective, the examined cases expose the procedural and substantive limitations of the RDP, the gender-guidelines and the complexities facing decision-makers. Findings from the case-law reveals that despite a new awareness to take gender into account in terms of policy development and implementation, refugee law and the RDP continues to be implemented through a male perspective, which consigns gender-based forms of violence to the private sphere.

I. The Complexity of Determining Refugee Status

⁶ These cases were chosen firstly, as they reaffirm the case-studies recognition of FGM as a basis for refugee status. Secondly, others highlight the inconsistent treatment and non-use of the gender-guidelines in seemingly similar cases. Finally, selection was also made on access and availability of cases.

As a recognised form of gender-based persecution⁷ and a human rights violation,⁸ to return a women/girl to a country where she would be subjected to FGM could arguably amount to a breach by the State concerned of its obligations under international human rights law. States worldwide, have enacted laws that specifically⁹ and more generally prohibit FGM.¹⁰ Moreover, since the 1990s, States have begun to recognize FGM as a form of persecution in their asylum decisions. In France, the Commission des Recours des Réfugiés accepted in *Aminata Diop*,¹¹ that FGM could constitute persecution, and that refugee status could be granted to a woman exposed to FGM against her will, where FGM was officially prescribed, encouraged or tolerated. In *Farah v. Canada*,¹² the IRB

⁷ UNHCR, *Guidelines on International Protection No. 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, (HCR/GIP/02/01), available online at <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, para. 9. Hereafter referred to as the UNHCR Gender Guidelines). The recognition of FGM as already discussed throughout the thesis as a form of persecution is supported, in the first instance, by developments in international and regional human rights law. See, Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 14: Female circumcision*, 1990, (A/45/38), available online via the UNHCR Refworld website at <http://www.unhcr.org/refworld/pdfid/453882a30.pdf> (last accessed 28/7/17); UNHCR Executive Committee, *Conclusion on Refugee children and adolescents*, No. 84 (XLVIII), 1997, para. (a)(v), available online via the UNHCR Refworld website at <http://www.unhcr.org/refworld/docid/3ae68c68c.html> (last accessed 1/7/17). See also, *Report of the Special Rapporteur on Violence against women, its causes and consequences: Cultural practices in the family that are violent towards women*, 31 Jan. 2002, (E/CN.4/2002/83), paras, 12–20, available online via the Office of the UNHCR website at <http://www.refworld.org/docid/3d6ce3cc0.html> (last accessed 17/7/17).

⁸ FGM violates a plethora of human rights, including the right to non-discrimination, to protection from mental and physical violence, to the highest attainable standard of health and, most importantly the right to life. FGM also constitutes torture and cruel, inhuman or degrading treatment as affirmed by international jurisprudence and legal doctrine, including by many of the UN treaty monitoring bodies. It also violates the rights of the child, the right to protection of physical and psychological integrity, and the rights of persons with disabilities. Several treaties, General Comments/Recommendations of treaty monitoring bodies, and consensus documents explicitly condemn FGM as a human rights violation. Other core human rights treaties of the United Nations and African Union provide general protections for the human rights of women and girls, which have been interpreted to prohibit FGM. Many of the sources of international law that are most frequently referenced to end FGM are listed in Appendix B.

⁹ See, UNHCR, “*Guidance Note on Refugee Claims Relating to Female Genital Mutilation*”, (2009), at 6. This note is available online at <http://www.refworld.org/pdfid/4a0c28492.pdf> (last accessed 1/7/17). (Hereafter referred to as the FGM Guidance Note).

¹⁰ If States do not have specific legislation prohibiting FGM, they tend to apply general provisions of their criminal codes with respect to intentional wounds or strikes, assault causing grievous harm, attacks on corporal and mental integrity, or violent acts which result in mutilation or permanent disability. *Ibid*.

¹¹ *CRR, 17 juillet 1991, 164078, Mlle Diop Aminata*, 164078, France: Commission des Recours des Réfugiés (CRR), 17 July 1991. While this particular claim failed on factual grounds, the principle has since been reaffirmed in France, upholding refugee status in, for instance, *Mlle Kinda, CRR, 366892*, 19 March 2001.

¹² *Farah v Canada* (MEI) (1994). The Board also found FGM to constitute a gross infringement of the applicant’s personal security, referring to the Universal Declaration on Human Rights, Resolution 217 (III) 1948 (Hereafter referred to as the UDHR), Article 3, as well as a number of child-specific rights. See also *Annan v. Canada*, Minister of Citizenship and Immigration, the Trial Division of the Federal Court, 6

described FGM as a “torturous custom” and recognized it as a form of persecution. The US BIA determined in *In Re Fauziya Kasinga*,¹³ that FGM constituted persecution. In the UK, refugee status in relation to a well-founded fear of FGM was first upheld in *Yake*¹⁴ and in the leading case of *Fornah*,¹⁵ the UKHL recognised FGM as a human rights violation and a form of persecution.¹⁶ Similar approaches have been adopted throughout Europe, including Austria,¹⁷ Germany¹⁸ and Belgium.¹⁹ The ECtHR has also determined that subjecting a woman to FGM amounts to ill-treatment contrary to Article 3 of the European Convention on Human Rights.²⁰

Despite this recognition, only a small number of women have been granted refugee status on the grounds of FGM and many claimants continue to be denied protection.²¹ Obstacles continue to hinder claimants, not least of which is concerns pertaining to cultural imperialism and gender and racial stereotypes. Other obstacles include credibility and a lack of firm evidence. Research undertaken by the Refugee Women’s Resource

July 1995, available online via the Refworld website at

<http://www.unhcr.org/refworld/docid/49997ae2f.html> (last accessed 17/7/17). The Court referred to FGM as a “cruel and barbaric” practice and the applicant was granted refugee status. The position in Canada has been reinforced by many further decisions.

¹³ *In Re Kasinga*, Int Dec 3278 (BIA 1996). *Kasinga* has been quoted in a series of further cases in the US, including in *Abankwah v. Immigration and Naturalization Service*, US Court of Appeals for the Second Circuit, 9 July 1999. The Court affirmed that it cannot be disputed that FGM involves the infliction of “grave harm constituting persecution”.

¹⁴ *Yake*, Immigration and Appeals Tribunal, Appeal Number 00TH00493, 19 January 2000.

¹⁵ *K & Fornah*, (2006) UKHL 46.

¹⁶ In this case it was stated that, “FGM constitutes treatment which would amount to persecution within the meaning of the Convention”, and that FGM, “is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment” *Ibid*.

¹⁷ *GZ (Cameroonian citizen)*, 220.268/0-X1/33/00, Austrian Federal Refugee Council, Independent Federal Asylum Senate, 21 March 2002.

¹⁸ See for instance, Aleinikoff T, “Protected characteristics and social perceptions: An analysis of the meaning of ‘membership of a particular social group’”, in Feller E, Türk V & Nicholson F, ‘Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection’, Cambridge University Press: London, (2003), at 183-4.

¹⁹ *Jurisprudence n° 979-1239*, Conseil du Contentieux des Etrangers, Belgium, 25 July 2007, available online via the UNHCR Refworld website at <http://www.unhcr.org/refworld/docid/4874d5082.html> (last accessed 1/7/17).

²⁰ See, *Emily Collins and Ashley Akaziebie v. Sweden*, European Court of Human Rights, Application no. 23944/05, 8 March 2007, available online via the UNHCR Refworld website at <http://www.unhcr.org/refworld/docid/46a8763e2.html> (last accessed 1/7/17). (Hereafter referred to as the ECtHR).

²¹ According to some academics, the vast majority of FGM claimants are “deported to be mutilated”. See, Comment, “Deported to be Mutilated?” (2005), available online at http://www.anarkismo.net/newswire.php?story_id=840 (last accessed 14/8/07).

Project,²² has found that refugee decision-makers hold preconceived ideas about claimants and their motives. They found that in some cases decision-makers held sexist and racist views, or applied cultural relativism, expecting women to accept abuse as it was part of their culture: all of which undermined a fair assessment of claims.²³ This culture of disbelief, as the jurisprudence and RWRP report had revealed, stems primarily from a lack of understanding in respect of the position of women within communities and gender-based violence generally. Coupled with fears of being labelled an economic migrant,²⁴ a lack of COI to substantiate claims, and the use of COI which is both spurious or does not reflect the reality of women's experiences,²⁵ these obstacles and misunderstandings act as impediments in determinations and may lead to credibility denials.²⁶

Before examining these obstacles in detail, it is important to note that the UNHCR has published a *Guidance Note on Refugee Claims relating to Female Genital Mutilation*²⁷ which advises on the substantive and procedural elements to be considered in such cases and establishes the grounds on which a claimant can qualify for refugee status under the 1951 Refugee Convention.²⁸ Promoting gender equality and working towards the elimination of violence against women and girls, is an integral part of the UNHCR's

²² The Refugee Women's Resource Project had undertaken research into the usage and implementation of the UK Home Offices Asylum Policy Instruction: *Gender Issues in the Asylum Claim*. Hereafter referred to as the RWRP.

²³ See, Ceneda S & Palmer C, "Lip Service or Implementation? The Home Office Gender Guidance and Women's Asylum Claims in the UK", Asylum Aid: London, (2006), at 91-92.

²⁴ In a number of instances, the unsuccessful asylum seeker is, in fact, an economic migrant who has tried to take advantage of the asylum system in the absence of any other available means of obtaining lawful entry into their chosen host state. For further information on these 'bogus' refugees as they have commonly been referred to and their use of asylum as a means of obtaining entry into 'wealthier' States see generally, Neumayer E, "Bogus Refugees? The Determinants of Asylum Migration to Western Europe". 49 International Studies Quarterly 389, (2005), at 389-409; Bhagwati J, "Borders Beyond Control", 28 Foreign Affairs 98, (2003); Stanley D, "Economic Migrants or Refugees from Violence? A Time-Series Analysis of Salvadorian Migration to the United States", 21 Latin American Research Review 132, (1987); Heckman G, "Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law", 15 International Journal of Refugee Law 212, (2003), at 214 (noting that restrictive immigration policies and policies limit asylum seekers' access to refugee determination).

²⁵ Ceneda & Palmer, *supra* note 23, at 61.

²⁶ *Ibid*, at 55.

²⁷ See, FGM Guidance Note, *supra* note 9.

²⁸ The Note finds that the threat of FGM or even FGM performed previously can constitute a well-founded fear of persecution, considering the ways in which FGM can be a child-specific form of persecution and a continuing form of harm. The issue of agents of persecution and availability of State protection are important and addressed within the Note. Under Convention grounds, FGM may constitute persecution due to a girl or woman's membership of a PSG, political opinion, or religion. The Note also addresses whether internal flight or relocation are sufficient alternatives.

protection mandate²⁹ and this note is a feature of this. However, this thesis suggests that another reason for the FGM Guidance Note, has been the recognized inconsistency in increasing FGM determinations. It firstly, reinforces the complexity of FGM claims, particularly its inherent gendered and discriminatory nature which makes it worthy of individualised consideration; and secondly it offers guidance on the interpretation and application of the applicable law and legal standards, which includes the substantive content of domestic gender-guidelines. In other words, where States, are failing to implement or interpret existing gender-guidelines appropriately in cases of FGM, this note purports to steer them in the right direction.

UNHCR documents, policies and guidelines are largely valued and proven to be influential. This is evident from the enactment of domestic gender-guidelines and amendments to refugee/asylum legislation to instruct decision-makers to recognize gender-based persecution as a potential ground for refugee protection³⁰ in light of the UNHCR gender-guidelines, which called on States to follow suit.³¹ Unfortunately, as a soft law document, the FGM Guidance Note does not live up to expectations or its objectives. Whilst it provides interpretative guidance for decision-makers, it fails to adequately examine procedural issues, which define the conduct of determination hearings, including the personnel present at the hearing and how those individuals conduct themselves and the proceedings. As discussed in Chapter Two, FGM claimants have particular needs that are often not considered in the RDP. The process can be difficult and affect the emotional well-being of claimants. The FGM Guidance Note fails to sensitize its audience to the wide spectrum of reasons as to why women experience humiliation,

²⁹ For further information on the protection mandate of the UNHCR, see UNHCR Global Report, “UNHCR’s Protection Mandate”, (2001), available online via the UNHCR Refugee Agency Website at <http://www.unhcr.org/3dafdd0014.html> (last accessed 27/7/17); Baines E, “Gender Construction and the Protection Mandate of the UNHCR: Responses from Guatemalan Women”, in Meyer K & Prugl E (eds), “Gender Politics in Global Governance”, Rowman & Littlefield: New York, (1999), Chapter 16; Clarence B, “UNHCR: Protection and Contemporary Needs”, (2006), available online at <http://www.fmreview.org/FMRpdfs/FMR26/FMR2637.pdf> (last accessed 30/3/17).

³⁰ See, Centre for Gender and Refugee Studies, “Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for US Attorneys”, Centre for Gender and Refugee Studies: San Francisco, (2014), at 3. This report is available online at <http://www.refworld.org/pdfid/54fd6f204.pdf> (last accessed 28/7/17).

³¹ The UNHCR Gender-Guidelines called upon States to develop and implement domestic criteria and guidelines regarding protection for women who claim refugee status based on a well-founded fear of gender-related persecution. *Ibid.*

pain, trauma, or shame in recounting degrading experiences and what can be done to alleviate their discomfort. This omission is surprising given the fact that the UNHCR and the domestic gender-guidelines all acknowledge the obstacles and specific difficulties facing women within the RDP and their effects on credibility. Arguably, this omission reinforces the belief that the UNHCR, like the case-studies is more concerned with interpreting the black letter of the law, rather than ensuring that the Refugee Convention definition and gender-guidelines are interpreted within a procedurally gender-sensitive environment.

Whilst it remains unclear to what extent the FGM Guidance Note is or will be used by decision-makers because of its non-binding nature, it certainly identifies FGM as an emerging legal and operational refugee issue which needs further clarification. It further suggests that the UNHCR is dissatisfied with domestic interpretations of FGM cases or at the very least concerned that FGM as a gender-based form of violence, is not being properly addressed within the RDP of States.

Despite these criticisms the enactment of gender-guidelines have been an important development and in some instances, they have been effectively applied in FGM cases. The following section will now discuss several of these cases where claimants have been granted either refugee status or humanitarian protection. This focus is important as it highlights successful application and interpretation of the examined gender-guidelines and Refugee Convention. Furthermore, it reinforces the argument that if the gender-guidelines were made legally binding and decision-makers were held accountable for their determinations then such claims would be decided in a more gender-sensitive manner; biases could be overcome; and the legal, historical and moral disparities in the protection afforded to female refugee claimants could be addressed and effectively remedied.

A. Correct Applications of the Gender-Guidelines

Increasing migration has led to a growing number of claimants from FGM practicing countries seeking protection and States, including the case-studies have recognised FGM as a form of persecution in their asylum decisions.

In 1994, in a landmark ruling, Canada became the first country in the world to grant refugee status based on a fear of FGM.³² Khadra Hassan Farah was a Somali national³³ who following the collapse of her marriage went to Canada with her two children and sought political asylum.³⁴ It was argued before the IRB that her ten-year-old daughter would be subjected to FGM if she were deported to Somalia.³⁵ In evidence, she testified about her own circumcision at the age of eight and resulting complications.³⁶ Farah further testified that, if deported, she would surrender her daughter for adoption in Canada rather than have her subjected FGM.³⁷ Farah argued that she feared losing custody of her children, because as a divorced woman, under Islamic law, her husband would have custody of their children and could prevent them from maintaining contact with her.³⁸ She testified that if she lost custody, she would be powerless to prevent the custom of FGM widely practiced in Somalia.³⁹ On the 10th May 1994, a two-member panel of the IRB rendered its decision.⁴⁰ It was determined that Farah's daughter's, "right to personal security would be grossly infringed" if her mother was forced to return to Somalia.⁴¹ In support of its decision, the panel cited the CIRB Gender Guidelines and the CRC.⁴² They concluded that, according to the principles enshrined in these documents, Farah's daughter was subject to persecution based on her membership in "two particular social

³² The IRB is an independent administrative tribunal that makes legally binding decisions. Similarly, within the Canadian context it is also important to note that orders of the Federal Court are binding in every province and territory in Canada, thus providing efficient, national coverage. The Federal Court has exclusive jurisdiction to review the legality of actions of most federal offices, boards, commissions, and tribunals. On this basis, most government decisions at the federal level may be challenged in the Federal Court, including immigration and refugee matters.

³³ *Farah v Canada*, *supra* note 12, at 1-2.

³⁴ Ms. Farah testified that her marriage was very abusive: "there were frequent arguments about her desire to be more independent. After three years of marriage she asked for a divorce, but her parents were opposed to it and her husband began to verbally and physically abuse her. She testified that he drank excessively and repeatedly beat her and their daughter". *Ibid*, at 2.

³⁵ *Ibid*, at 2.

³⁶ *Ibid*, at 9-10.

³⁷ *Ibid*, at 3.

³⁸ Ms. Farah's ex-husband had previously abducted their oldest son and prevented him from contacting her, and therefore Ms. Farah had a realistic fear that if her husband obtained custody of their daughter, he would prevent contact between them as well. *Ibid*, at 2.

³⁹ *Ibid*, at 3. It was concluded by the panel based on COI that even though FGM had been outlawed in Somalia since 1947, an estimated 98% of women had been subjected to the practice. *Ibid*, at 8.

⁴⁰ *Farah v Canada*, *supra* note 12.

⁴¹ The panel also said that they were "satisfied that the authorities in Somalia will not protect [Hodan] from the physical and emotional ravages of FGM, given the evidence of its widespread practice in that country." *Ibid*, at 11.

⁴² *Ibid*, at 10-11.

groups, namely, women and minors."⁴³ The panel stated that her gender, "is clearly an 'innate or unchangeable characteristic,' and the fact that she is below the age of majority is also, for the foreseeable future, something she cannot change."⁴⁴ Thus, she qualified as a member of both PSG's⁴⁵ and was eligible for asylum.⁴⁶ The Farah decision created a lot of controversy because some feared that the ruling would cause a flood of refugees seeking asylum in Canada to escape FGM.⁴⁷ Whilst that fear was unfounded⁴⁸, this case highlights the importance of adopting a gender lens when determining FGM cases. The positive implications of adopting a gender-sensitive approach to the Refugee Convention definition and the use of the CIRB gender-guidelines are evident in this case and reinforce the objectives at the heart of this thesis.

The US, a purported leader in the human rights campaign, has historically refused to expand existing immigration law to provide a haven for women fleeing FGM.⁴⁹ Like the fears expressed in wake of the *Farah* decision, the fear of "opening the floodgates," had served as a justification for the failure of the US to recognize FGM as a legitimate basis

⁴³ *Ibid*, at 11.

⁴⁴ *Ibid* (citing *Canada (Attorney General) v. Ward*, 103 D.L.4th 1 (1993)).

⁴⁵ *Ibid*.

⁴⁶ *Ibid*. The IRB also granted political asylum to Ms. Farah as a member of a PSG, namely women. The IRB found that "as a divorced mother under the jurisdiction of Sharia law [Ms. Farah's] rights as a parent and her right to personal security are not upheld as the international human rights instruments require." *Ibid*, at 7. Additionally, the IRB granted political asylum to Ms. Farah's son, determining that his "being forcibly removed from the care and nurture of his mother" by his father under Sharia law constituted persecution. *Ibid*, at 11. The panel further determined that Ms. Farah's ex-husband "would exercise his prerogative under Sharia law to take custody of his son and deny him access to his mother, the only custodial parent with whom he has formed an enduring bond." *Ibid*. Citing Articles 3, 9, and 12 of the CRC, the panel found that the "best interests of the child" (in this case, the son) would not be considered by his father because of his violent nature. The panel, citing *Ward*, found that based on the son's "innate or unchangeable characteristic" and the fact that he was below the age of majority (he was seven at the time of the hearing), his was "minors." *Ibid*, at 12-13.

⁴⁷ However, Nurjehan Mawani, chairperson of the IRB, said that she did not expect a flood of claims because of the Farah decision. She stated that, "Refugee determination is always on a case-by-case basis ... I expect we may see a few more cases, but certainly no floodgates. If you look at the overall worldwide situation, only 5 percent of world refugees are able to claim refugee status in the West, and of these the proportion of women is abysmally small. Women do not have the same mobility as men". See, Kelson G, "Granting Political Asylum to Potential Victims of Female Circumcision", 3 Institute for Women and Children's Policy 257, (1996), at 274 (discussing the Farah Case and its impact).

⁴⁸ *Ibid*.

⁴⁹ See, Bashir L, "Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law", 4 The American University Journal of Gender, Social Policy and the Law 415, (1996), at 417-18 (1996) (noting US failure to respond to practice of FGM).

for asylum.⁵⁰ In *In re Kasinga*,⁵¹ the BIA, however, granted asylum to a woman fleeing FGM and set binding precedent for the 179 immigration judges who thus far had been divided on the issue”.⁵²

Fauziya Kassindja fled her home in Togo when she was 17 to escape FGM. Her father had been protecting her from the custom, practiced among their tribe in Togo, but after his death, Fauziya’s aunt took over their household and forced her into a polygamous marriage with an older man and informed her she was to undergo FGM. Fauziya fled first to Ghana, then to Germany. She arrived in the US in 1994 and immediately requested asylum.⁵³ The BIA in its first case involving gender-related persecution since the introduction of the INS gender-guidelines,⁵⁴ found that FGM as practiced by the Tchamba-Kunsuntu tribe, to which Fauziya belonged, constituted persecution.⁵⁵ Having explicitly referred to the suggestions set out in the INS Gender Guidelines⁵⁶, COI and other sources detailing the trauma of FGM,⁵⁷ the BIA made strong reference to the permanent effects of FGM in general.⁵⁸ It found Fauziya to be at risk of future FGM in Togo because she was a member of the PSG, “young women of the Tchamba-Kunsuntu

⁵⁰ See, Sheridan M, “*In re Fauziya Kasinga: The United States Has Opened Its Doors to Victims of Female Genital Mutilation*”, 71 St. Johns Law Review 433, (1997), at 457. For a more thorough review of the history of gender asylum in the US and relevant international instruments, see Musalo K, “*A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims*”, 29 Refugee Survey Quarterly 2, (2010). See also, Centre for Gender and Refugee Studies, “*Domestic Violence Based Asylum Claims: GCRS Practice Advisory*”, Centre for Gender and Refugee Studies: San Francisco (2014), at 2-3. This document is available online at [https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20\(Sept%202012,%202014\).pdf](https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20(Sept%202012,%202014).pdf) (last accessed 17/7/17).

⁵¹ See, *In re Kasinga*, *supra* note 13. See also, Sinha A, “*Domestic Violence and US Asylum Law: Eliminating the ‘Cultural Hook’ for Claims Involving Gender-Related Persecution*”, 76 New York University Law Review 1562, (2001), at 1563.

⁵² Sheridan, *supra* note 50, at 457.

⁵³ Following her request for asylum, she was placed in detention, where she remained for over a year.

⁵⁴ Sinha, *supra* note 51, at 1563.

⁵⁵ *In Re Kasinga*, *supra* note 13 at 362.

⁵⁶ Sinha, *supra* note 51, at 1563.

⁵⁷ The decision of the BIA relied upon the claimant’s testimony and secondary sources to describe FGM, as practised by the Tchamba-Kunsuntu Tribe, as “an extreme type of FGM, involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period. See, *In Re Kasinga*, *supra* note 13, at 365. The panel also relied upon secondary sources to establish the serious physical and psychological trauma of FGM as well as its prevalence. In fact, the decision cites two reports compiled by the US Department of State in its discussion of the conditions in Togo. *Ibid*.

⁵⁸ The BIA stated that, “FGM permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions”. *Ibid*, at 361.

Tribe who had not had FGM, as practiced by that tribe, and who oppose the practice.”⁵⁹ The BIA found that Togo did nothing to prevent the forced infliction of FGM on women, and that the practice was a country-wide problem. It thus determined that Fauziya had a well-founded fear of persecution in the form of FGM.⁶⁰

The Kasinga ruling represents a long overdue effort by the INS to expand antiquated laws to afford women protection from gender-related persecution such as FGM. The decision, and more specifically the use of the INS Gender-Guidelines in the case, implicitly overcame interpretive barriers that often stand in the way of relief in gender-based asylum claims. The decision is limited, however, and therefore is only a small step toward gender equality under asylum law. The BIA narrowly defined the PSG to be specifically, "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice".⁶¹ The board further declined, to "speculate on, or establish rules for, cases" not before it".⁶² Thus, while a binding precedent has been set, it is limited such that disparate rulings may still continue.

Until the seminal case of *Fornah* in 2006, the UK showed a clear reluctance to allow asylum appeals based on a fear of FGM.⁶³ Like its American and Canadian counterparts,

⁵⁹ *Ibid*, at 368. The court applied the test set forth in *In re Acosta*, 19 I & N. Dec 211 (BIA. Mar. 1, 1995), which established that a PSG is defined by characteristics members of the group possess that either cannot be changed, or that should not be required to change because they are central to their identities. *In re Kasinga*, *supra* note 13, at 365-66. In the *Kasinga* case the court found that, "the characteristics of having intact genitalia is one that is so fundamental to the individual identity of a young women that she should not be required to change it". *Ibid*, at 366.

⁶⁰ *Kasinga* also involved a forced marriage claim, adjudication of which the BIA did not reach in its final holding. However, the relationship between FGM and forced marriage was noted in Judge Rosenberg's concurrence (*Ibid*, at 374).

⁶¹ *In Re Kasinga*, *supra* note 13 at 368.

⁶² The Board rejected the INS's request to "endorse a significant new framework for assessing asylum claims in the context of a single novel case," noting that such a task should be left to Congress (Filppu, Board Member, concurring). *But see*, *Kasinga*, Int. Dec. 3278, 1996 WIL 379826 (Rosenberg, concurring) (noting that majority decision implicitly established "road map" for future gender-based claims).

⁶³ In fact, between 2001 and 2006 there was only one successful reported appeal upheld under the Refugee Convention, despite earlier political statements to the contrary and the Home Office's own guidance. *See*, *P and M* [2004] EWCA Civ. 1640. *See also*, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, Home Office, October 2006, at 9-10. Available from the Home Office Immigration and Nationality Directorate's website:

http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis/gender_issues_in_the.html. (last accessed 2/11/15) ("Women who may be subject to FGM have been found by the courts in some circumstances to constitute a PSG for the purposes of the 1951 Convention. Whether a PSG exists will depend on the conditions in the 'society' from which the claimant comes. If there is a well-founded fear, which includes evidence that FGM is knowingly tolerated by the authorities or they are unable to offer effective protection, and there is no possibility of an internal flight option, a claimant who claims that she would on return to her home country suffer FGM may qualify for refugee status"). *See further* the comments

it has been suggested that claims based on FGM may be rejected because UK immigration officers, are concerned about opening up ‘floodgates’ to female victims of violence globally.⁶⁴

Fornah was a 15-year-old girl who claimed that she was entitled to recognition as a refugee because she would be subjected to FGM if returned to Sierra Leone.⁶⁵ She was confirmed as a refugee by the unanimous decision of the UKHL judicial committee on 18th October 2006. Reversing the Court of Appeal, the Lords held that women in societies which practiced FGM were members of a PSG for the purposes of the Refugee Convention. The Court of Appeal had determined that FGM constituted torture or inhuman or degrading treatment, so that a risk of it at home meant that removal from the UK would violate Article 3 of the ECHR. However, the majority in the Court of Appeal held that although FGM constituted ‘persecution’, the young women facing it could not bring themselves within the definition of refugee, since the only relevant group was ‘young women at risk of FGM’, and the rule could not be defined by the persecution its members feared. The UKHL dismissed this reasoning. Relying on extensive documentation, including the Home Office’s Asylum Policy Instruction on Gender,⁶⁶ and the UNHCR PSG Guidelines,⁶⁷ they accepted that Fornah had a well-founded of

of Ann Widdecombe, ““We would regard enforced abortion as torture, as we would have enforced mutilation or sterilization. I stress that both personally and as a Minister I utterly accept that forcible ...genital mutilation and allied practices would almost always constitute torture. In fact, they would probably always constitute torture. There is no doubt in my mind that anyone making a case to us on those grounds would have an extremely good case for asylum.” Anne Widdecombe, then M.P. and Minister of State for the Home Office, Lords Amendments to the Asylum & Immigration Bill 1995/1996, Hansard Col. 842-844; 822-825 and 476-477.

⁶⁴ FORWARD, “*Female Genital Mutilation as Grounds for Asylum*”, (2014), available online at <http://www.forwarduk.org.uk/keyissues/fgm/fgm-asylum>, (last accessed 20/8/16).

⁶⁵ Before coming to the UK, the applicant had had to move from her home to shelter from the civil war at her father’s village in Sierra Leone. At the age of 15 she overheard discussions of plans to initiate her into womanhood by her undergoing FGM. She ran away and was captured by rebels and made pregnant through repeated rape by the rebel leader. She escaped to the United Kingdom with the help of her uncle. The Secretary of State for the Home Department accepted the applicant was telling the truth and that she would be subjected to inhuman and degrading treatment if she was returned to Sierra Leone, granting protection under Art 3 of the European Convention on Human Rights. The applicant appealed on the basis that she should be recognised as a refugee.

⁶⁶ *Fornah*, *supra* note 15, para 26.

⁶⁷ *Ibid*, para 98-103 (noting the influence of the UNHCR Guidelines on *Membership of a Particular Social Group*: 2002 San Remo Expert Roundtable conclusions; and international case-law defining the construction of the PSG category). *See also*, para 95 (discussing information supplied by UNICEF, NGOs and Medical Experts).

persecution⁶⁸ and that in a society which discriminates against them, women can constitute a PSG, although the majority preferred to define the group in this case more narrowly, as ‘uninitiated, intact women’.⁶⁹

The decision in *Fornah* is important in establishing a gender-sensitive and gender-inclusive interpretation of the Refugee Convention. Its contextual and straightforward approach to the Refugee Convention and the PSG definition, widely recognized as the ground with least clarity, has won support from organizations and individuals working with women in the refugee system.⁷⁰ The decision set a new precedent heralding a comparatively late acceptance in the UK that FGM can indeed constitute persecution in terms of the Refugee Convention, and that females fleeing a well-founded fear of FGM can form a ‘PSG’.⁷¹

Farah, *Kasinga* and *Fornah* overturned their respective courts protracted line of restrictive authorities⁷² and in doing so, supposedly “signalled the end of the exclusion of

⁶⁸ *Ibid*, para 96 (“No-one disputes that FGM amounts to persecution or that Miss Fornah’s fear of persecution is well-founded. The evidence also suggests that the treatment she would face were she to succeed in resisting FGM might itself amount to persecution. Nor is there any dispute that, although the treatment itself would be meted out by non-State actors, the State is unable or unwilling to offer her adequate protection against it”).

⁶⁹ *Ibid*, para 114.

⁷⁰ See, Chaudhry M, “Particular Social Group Post *Fornah*”, 21 Journal of Immigration, Asylum and Nationality Law 132, (2008).

⁷¹ Previously, as mentioned, the IAT had steadfastly rejected the very legal arguments which were later accepted unanimously in *Fornah*. The proposition that females at risk of FGM could form a PSG for the purposes of the Refugee Convention had been repeatedly dismissed by the Tribunal between 2001 and 2006. It is interesting to contrast the approach to legal tests and concepts involved in FGM appeals across international jurisdictions, i.e. contrast decisions of the UK Asylum and Immigration Tribunal 2001-2006 with the decisions of the Immigration Appellate authorities in: US e.g. *Kasinga*, *supra* note 13; Canada e.g. MAI-OO356/367/378 IRB) and Australia e.g. V97/06156; V98/09568 RRT) – all of which accepted women as a ‘PSG’ and FGM as persecution and the basis of a successful refugee appeal years – even a decade – before the UK Immigration & Asylum Tribunal. According to Loughran, until the Lords’ ruling in *Fornah*, there had been an exceedingly restrictive interpretation in the UK courts of key concepts such as ‘PSG’ and ‘Convention Reason’. The most common reason for dismissing FGM-asylum claims prior to *Fornah* in the Lords was rejection of definitions of PSG because of an inability to define the relevant PSG without reference to FGM. Prior to *Fornah*, two Court of Appeal cases revealed a split of opinions. Loughran N, “Female Genital Mutilation” (2006), available online via the Child Asylum and Refugee Issues in Scotland website at http://www.savethechildren.org.uk/caris/legal/srandi/sr_22.php (last accessed 19/6/16).

⁷² The measure of the *volte face* in approach to FGM in the UK courts which the Lords’ ruling heralded, can be illustrated by contrasting the decision of the earlier Court of Appeal ruling in 2005 of *Fornah*, (*ZAINAB ESTHER GORNAH* (2005) EWCA. CIV 680.9/6/05) in particular the opinions of Lords Auld and Chadwick, with the opinions of their Lordships in the Lords in 2006 in the same case (2006 UKHL 46). In a reversal of the reasoning of Lords Auld and Chadwick, FGM was accepted as ‘persecution’ in terms of the Refugee Convention and Sierra Leone females fearing FGM were accepted as forming a PSG. See, Loughran, *supra* note 71.

women from the protection of the Refugee Convention”.⁷³ They offer a new approach to the treatment of women’s rights and show that a gender-sensitive approach to the interpretation of laws is possible and ensures that women’s experiences are recognized. The positive sentiments emanating from these authorities has been repeated in a corpus of other FGM-related cases, including claims pertaining to past persecution and FGM parent-child claims, which will now be examined.

1. Parent-Child FGM Claims

Immediately following *Kasinga*, US immigration judges applied asylum law to the claims of parents fearing that their daughters would be subjected to FGM. In *In re Adeniji*, a father was granted withholding of removal⁷⁴ on the basis that this US born daughter would be subjected to FGM if he was returned to Nigeria.⁷⁵ It was determined that if the father were to be deported, his daughters would be “de facto” removed and subjected to FGM.⁷⁶ In another case, *Matter of Konate*, a mother received asylum as a result of the persecution she would face because her “opposition to gender norms, demonstrated in part by her attempts to protect her daughter from FGM, constituted a political opinion”.⁷⁷ Similarly in, *Matter of Dibba*, decided in 2001, it was recognized that persecution would result for a mother if she was forced to return to Gambia, where her daughter would face the threat of FGM. This time, the Board concluded that the psychological harms she would personally experience - exposing her child to torture or forced abandonment of her child

⁷³ See, Loughran, *supra* note 71, (“For only the second time in the UK in six years, an appeal court had accepted that a well-founded risk of FGM should ground a claim for asylum, not just human rights. The highest Court in the UK had overturned the UK Immigration and Asylum Tribunal’s long line of authority and accepted that FGM should be considered persecution in terms of the Refugee Convention, and that a Convention ground does exist-membership of the PSG– females in the country of origin”).

⁷⁴ Withholding of removal is granted according to a standard very similar to asylum except that when an alien meets the withholding criteria, the remedy is mandatory, whereas asylum grants are always discretionary. Compare 8 U.S.C. § 1253(h)(1) with 8 U.S.C.A § 1158(b)(1)(A). Also, the withholding of removal standard requires a showing of a greater probability of harm (more likely than not) than does the asylum standard (reasonable possibility). See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423, 440 (1987).

⁷⁵ *In re Adeniji*, No. A41 542 131 (oral decision) (U.S. Dept. of Justice, Immigration Court, York, Pa., Mar. 10, 1998), discussed in *Bah v. Gonzales*, 462 F.3d 637, 642 (6th Cir. 2006).

⁷⁶ Rice, M, “Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum”, Immigr. Briefings, (2004) at 1-1.

⁷⁷ *Ibid*, at 15 note 12. See, *Matter of Konate* (U.S. Dept. of Justice, Immigration Court, Boston, Mass., Feb. 19, 1998).

- would rise to the level of persecution.⁷⁸ Furthermore, in *Abay v Ashcroft*,⁷⁹ a mother and daughter sought asylum based on their fear that, should they be returned to Ethiopia, Amare would be subjected to FGM a practice “nearly universal” in Ethiopia and to which an estimated 90% of women are subjected, according to State Department reports.⁸⁰ An immigration judge had held that neither Abay nor Amare established that she was a “refugee” eligible for asylum or withholding of deportation. The Sixth Circuit, Court of Appeal, reversed the decision of the BIA, reasoning that based on the evidence on the record both the minor child Amare and her mother had a well-founded fear that Amare would be subjected to FGM should they be returned to Ethiopia and were consequently “refugees” eligible for asylum under the Act.⁸¹ This decision, along with the decisions discussed above, suggest a governing principle in favour of refugee status in cases where a parent is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm.

Comparable, stances have been taken in parent-child FGM cases emanating from the UK and Canada. In the 2006 case of *Ndegwa v. Canada*,⁸² the court dealt with the case of a Kenyan man who claimed asylum on grounds of fear of persecution in Kenya due to refusing to have FGM performed on his daughter. His wife and daughter were granted refugee status, the man was initially refused but then given status upon review.⁸³ Other additional Canadian cases, reinforce this sentiment and illustrate a proper gender-sensitive interpretation of the sentiments of the CIRB gender-guidelines particularly in respects of construing PSG’s, taking note of COI and properly construing the IFA by recognizing that

⁷⁸ *Matter of Dibba*, No. A73 541 857 (B.I.A. 2001) discussed in Rice, *supra* note 76; see also *Bah v. Gonzales*, *supra* note 75.

⁷⁹ *Abay v Ashcroft*, 368 F.ed 634, 641 (6th Cir.2004).

⁸⁰ *Ibid*, at 634.

⁸¹ It was stated that, “Given the evidence in the record that female genital mutilation is “nearly universal” in Ethiopia; that Abay herself underwent the procedure at a young age; that Abay’s mother has already attempted to mutilate Abay’s older daughters, who still faced that prospect upon their marriage; that Abay would not be able to override any of her daughters’ future husbands or in-law’s wishes; and that the government of Ethiopia does not, as a practical matter, enforce laws intended to curb harmful traditional practices, we conclude that a rational factfinder would be compelled to find that Abay’s fear of taking her daughter into the lion’s den of female genital mutilation in Ethiopia and being forced to witness the pain and suffering of her daughter is well-founded. Accordingly, we find that Abay is also a “refugee” within the meaning of the Act”.

⁸² *Ndegwa v. Canada (Minister of Citizenship and Immigration)*, (2006) F.C. 847 (Can.).

⁸³ The Supreme Court of Canada explained that “there was a sufficient nexus between the claimants claim and his wife and daughter’s persecution” and that the IRB erred by “not considering whether the claimant would be persecuted as a member of his family. *Ibid*, para 9-10.

if forced to relocate, a woman may face hardship, including having to rely on prostitution or being vulnerable for further abuse or exploitation.⁸⁴

Case-law from the UK further reinforces the theoretical basis for granting asylum to parents with children at risk of FGM. In *FM (FGM) Sudan CG*⁸⁵ heard before the AIT in 2007, a Sudanese woman appealed against an adjudicator's decision to refuse her and her children leave to remain in the UK. The woman feared that her two daughters would be subjected to FGM if returned.⁸⁶ The adjudicator had discounted evidence by the woman dealing with the 'real risk' posed to her daughters of being compelled to undergo FGM⁸⁷ and the risk to the mother who had campaigned against FGM while outside Sudan.⁸⁸ The AIT decided to take into consideration fresh evidence by an expert in order to come to a decision.⁸⁹ The expert considered the risk of FGM to be "very real"⁹⁰ and that the

⁸⁴ For instance, in *CRDD T97-03141*, May 27 (1998), claimants from Somalia sought protection based on their feared persecution as members of the Darod clan and the Majerten and Marehan subclans. Three of the minor claimants also feared persecution because of the practice of FGM. The Refugee Division found that the CIRB gender-guidelines applied to the three minor claimants, that they had a well-founded fear of persecution because of their membership in the PSG of female children, and that State protection would not be available to them from FGM. Since FGM is a widespread practice in Somalia, the existence of an IFA was not an issue for these claimants. The Division further reasoned that, the principal claimant was a woman alone with seven children in her care. All of the claimants had a well-founded fear of persecution in Mogadishu because they were Darod. Mogadishu was not yet a stable environment for a lone woman with seven dependents. An IFA was not available to the claimants because the family was a mixture of Majerten and Marehan sub-clans. Similarly, in another case, the claimants alleged that they had a fear of persecution by reason of their membership in the social groups, namely women and illegitimate children. The principal claimant, a member of the Peul ethnic group, was the mother of two illegitimate minors born of a relationship with a friend whom she planned to marry. The man's marriage proposal was rejected by the claimant's father because it was contrary, not only to the customs practiced in the Peul community, but also to Islamic moral principles. The claimant stated that, in order to punish her, her father forced her to marry another man. The claimant feared for herself, her daughter-who would have to undergo FGM -as well as for her son, who would be condemned to live in shame his whole life. Finding the claimant's testimony credible, the panel determined that the forced marriage, the threatened FGM, and the prejudice feared by the claimant's son amounted to persecution. According to the panel, given that the documentary evidence indicated that in Guinea custom had precedence over written law, it was unreasonable to seek, in this case, State protection, much less an IFA. The claimants were granted refugee status. For further information on these and other cases, see, IRB, "Compendium of Decisions, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update (February 2003), at 32-4. This compendium is available online via the IRB Website at <http://www.refworld.org/docid/4713831e2.html> (last accessed 17/7/17).

⁸⁵ *FM (FGM) Sudan v. Secretary of State for the Home Department*, [2007] UKAIT 00060 (U.K. Asylum and Immigration Tribunal), available online via the BAILLI website at <http://www.bailii.org/uk/cases/UKIAT/2007/00060.html> (last accessed 17/7/17).

⁸⁶ *Ibid*, at 1.

⁸⁷ *Ibid*, at 2

⁸⁸ *Ibid*, at 12.

⁸⁹ *Ibid*, at 5.

⁹⁰ *Ibid*, at 6.

mother's activities put her at risk as well.⁹¹ The tribunal found that the daughters were 'at real risk on return of treatment that would be contrary to article 3 of the ECHR'⁹² and that they belonged to a PSG.⁹³ Further, it was held that the mother was 'at real risk of persecution for a Refugee Convention reason', not because of her political opinion but due to her abhorrence of FGM. It was determined that, any infliction of FGM upon either of her daughters was reasonably likely to have so profound an effect upon as to amount to the infliction on her of persecutory harm.⁹⁴ The AIT also found that state protection and internal relocation were not an option.⁹⁵ Essentially, the decision was overturned due to a flawed assessment of the risk of undergoing FGM made due to a dismissal of evidence. This decision which reinforces the importance of applying the guidelines and using appropriate COI information, is consistent with several other UK cases where the AIT granted relief to parents because the harm they would experience from their inability to prevent their daughter's subjection to FGM.⁹⁶ Similar, positive sentiments have been applied in cases where claimants have a well-founded fear of FGM. These cases will now be examined in the next section.

2. Individual Claims

Women who flee prospective FGM, or who have undergone FGM seek protection on account of its attendant harms. Such claims have generally drawn upon the legal theory that FGM is a persecutory act in its execution and in its myriad of on-going consequences. Where a woman has not yet been subjected to FGM and has sought protection, it can be argued that she has a well-founded fear of future persecution in the form of FGM. The clear precedent established in *Kasinga* supports asylum grants based on this theory. If COI indicates a widespread approval or practice of FGM, and where personal history

⁹¹ *Ibid*, at 12.

⁹² *Ibid*, at 163.

⁹³ *Ibid*, at 145.

⁹⁴ *Ibid*, at 161.

⁹⁵ *Ibid*, at 160.

⁹⁶ See, Conroy M, "Refugees Themselves: The Asylum Case for Parents of Children at Risk of Female Genital Mutilation", 22 Harvard Human Journal 109, (2009). See also, *M.H. & Others v. Secretary of State for the Home Department*, [2002] UKIAT 02691 (U.K. Asylum and Immigration Tribunal), available online at <http://www.bailii.org/uk/cases/UKIAT/2002/02691.html> (last accessed 17/7/17); *Hashim v Secretary of State for the Home Department*, IAT 16 Jul. 2002, [2002] UK IAT 02691.

shows individualized risk or intent of a third party to force FGM upon the claimant,⁹⁷ cases should hypothetically be straightforward to make. With a risk of future coercion or inability to resist FGM in the country of origin established, claimants should be able to establish both a subjectively genuine and objectively reasonable fear of future FGM.

In addition to the fear of FGM, claimants who have rejected the custom face additional reprisals from family and friends, including physical assaults. Other may have a well-founded fear of persecution in societies where un-circumcised women are ostracized, targeted for violence, or otherwise harmed due to their “unclean” status. They may also fear other, related harms on account of the same grounds upon which they are threatened with FGM.⁹⁸

Women already subjected to FGM, generally assert a claim for asylum based on the past persecution of FGM, which entitles them to a presumption of a well-founded fear of persecution. First, in cases where the claimant comes from a community where women can be subjected to FGM more than once, the likelihood of additional FGM should of course be explored and asserted.⁹⁹ Secondly, women who have already been subjected to FGM may also assert eligibility for asylum based on the continuing consequences of the practice.¹⁰⁰ Regulations governing rebuttal of the presumption of a well-founded fear do not require that individuals fear identical harm as that which was suffered in the past.¹⁰¹ This has been affirmed in the UNHCR FGM Guidance Note.¹⁰² Aside from its harmful consequences, it can further be asserted that FGM is related to a larger system of female

⁹⁷ Frydman L & Seelinger K, “*Kasinga’s Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*”, 13 *Bender’s Immigration Bulletin* 1073, (2008), at 1075. The Centre for Gender and Refugee Studies (CGRS) database of unpublished asylum office and immigration judge decisions indicate the clear precedent of *Kasinga* supports asylum in cases where an applicant can prove likely subjection to FGC upon return. Asylum has been denied mainly in cases where the applicant simply failed to make this requisite showing.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ According to the CGRS, this ‘on-going’ theory of past FGM follows the BIA’s reasoning in *In re Y-T-L-*, in 2003, in which the board determined that certain acts of persecution, including forced sterilization, constitute, “a permanent and continuing act of persecution.” See, *In re Y-T-L-*, 23 I. & N. Dec. 601 (BIA 2003). Arguably, claimants who have already undergone the practice can argue that their persecution in the form of FGM is similar in its continuing impact: As already discussed in this chapter, FGM is often accompanied by both short and long term consequences that reach far beyond the period of actual cutting, including formation of abscesses, loss of sexual sensation, painful sexual intercourse, child-birth complications, increased infant mortality, and varying degrees of emotional and psychological traumatization.

¹⁰¹ Frydman & Seelinger, *supra* note 97, at 1075.

¹⁰² FGM Guidance Note, *supra* note 9, at 8-9.

subjugation, wherein a woman who has already undergone FGM may remain at risk of forced marriage, domestic violence, marital rape, and other related harms that COI may indicate.¹⁰³

The leading US case on the treatment of FGM as past persecution is *Mohammed v. Gonzales*.¹⁰⁴ In this case, a Somali woman who had undergone FGM¹⁰⁵ claimed that the FGM constituted past persecution which warranted the presumption that she had a well-founded fear of future persecution.¹⁰⁶ The government contended that the past infliction of FGM should have rebutted the presumption because, having already suffered FGM, it was unlikely that the claimant would be inflicted with the procedure in the future.¹⁰⁷ Referring to the INS Gender-Guidelines and COI,¹⁰⁸ the Ninth Circuit rejected this argument, analogizing FGM to forced sterilization, which had been classified as a

¹⁰³ Finally, it should also be noted that, women who have already undergone FGM are able to assert eligibility for humanitarian asylum due to the “severe and atrocious” nature of the FGM which they have suffered. There have been successful grants of protection made to claimants based on the legal theory that FGM is a persecutory act in its execution and in its myriad of on-going consequences. *See*, Frydman & Seelinger, *supra* note 97, at 1075. *See also*, *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989).

¹⁰⁴ *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). According to Mohamed, her family fled Somalia during the civil war, when she was a young child. The flight was precipitated by the disappearance of her father and brother, the rape of her sister, and an attempt by the militia of a majority clan to imprison her family along with other members of her clan. She lived in Ethiopia for a number of years without legal status, before arriving in the US.

¹⁰⁵ After the BIA denied her appeal, Mohamed hired a new attorney who filed a motion to reconsider and remand. The motion asked the BIA to reconsider on the ground that Mohamed feared that she would be subjected to FGM should she be returned to Somalia. It stated that over ninety-eight percent of women in Somalia are subjected to FGM, that Mohamed's first attorney did not raise the issue at the hearing or on appeal, and that Mohamed had not yet been genitally mutilated. attached to the motion was a letter from Mohamed's prior counsel, in which she admitted that she failed to ask her minor client whether she had been subjected to FGM and did not consider raising it as part of the asylum claim, although she believed that such treatment was “clearly past persecution” (and although the State Department reports contained in the record of the hearing stated that “virtually all” Somalian women were victims of that practice). *Ibid.* at 789-790.

¹⁰⁶ *Ibid.*, at 791.

¹⁰⁷ *Ibid.*, at 799.

¹⁰⁸ The Ninth Circuit cited country conditions information indicating that a Benadiri woman returned to Somalia faced great risk of other harm, including gender-based subordination and that Ms. Mohammed risked further FGM in the form of later infibulation, which is inflicted upon 80% of Somali women. *Ibid* “The State Department Reports in the record make clear that the subordination and persecution of women in Somalia is not limited to genital mutilation. Rather, “[w]omen are subordinated systematically in the country's overwhelmingly patriarchal culture,” and “[r]ape is commonly practiced in inter-clan conflicts.” The court also stated that, “As a member of the minority Benadiri clan, Mohamed is “especially vulnerable to attack” and has “little or nothing to which to return.” *See*, *Awale v. Ashcroft*, 384 F.3d 527, 531 (8th Cir.2004) (explaining that Somalian women of minority clans “who lack the protection of powerful clan structures or who belong to particularly vulnerable groups, such as ethnic minorities, are particularly at risk.”)

“continuing harm that renders a petitioner eligible for asylum, without more”.¹⁰⁹ This holding effectively made a showing of FGM sufficient to create an irrebuttable presumption of a well-founded fear of persecution.

The Ninth Circuit further stated that even if FGM created a mere rebuttable presumption of a well-founded fear, the presumption would still be difficult to rebut because of the risk of violence and gender persecution, as evidenced by the applicant’s FGM, if the applicant was removed to her home country.¹¹⁰ This alternative theory has been endorsed by the Eighth Circuit in *Hassan v. Gonzales*, which held that a showing of past FGM would create a presumption of a well-founded fear since the applicant could still suffer from forms of future persecution other than FGM.¹¹¹ Similar sentiments have been expressed by the Fourth¹¹² and Second Circuit Courts of Appeals.¹¹³

Jurisprudence from the UK and Canada further supports the proposition that where a claimant had sought protection to avoid FGM, they have a well-founded fear of future persecution of FGM and the ostracizing and harmful consequences of rejecting the

¹⁰⁹ It was reasoned that, “like forced sterilization, genital mutilation permanently disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling sexual life.” *Ibid. See also, Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (characterizing forced sterilization as a form of permanent and continuous persecution which creates an irrebuttable presumption of a well-founded fear of persecution).

¹¹⁰ *Mohammed*, *supra* note 104, at 800. The State Department Reports in the record make clear that the subordination and persecution of women in Somalia is not limited to genital mutilation. Rather, “[w]omen are subordinated systematically in the country’s overwhelmingly patriarchal culture,” and “[r]ape is commonly practiced in inter-clan conflicts.” The court also stated that, “As a member of the minority Benadiri clan, Mohamed is “especially vulnerable to attack” and has “little or nothing to which to return.” *See, Awale v. Ashcroft*, *supra* note 108, (explaining that Somalian women of minority clans “who lack the protection of powerful clan structures or who belong to particularly vulnerable groups, such as ethnic minorities, are particularly at risk.”

¹¹¹ *See, Mohammed*, *supra* note 104, at 518. In *Hassan v. Gonzales*, the Eighth Circuit held that FGM constitutes persecution. It further found, in light of country condition information regarding the practice of FGM in Somalia, that the claimant suffered FGM on account of her being a member of the PSG ‘Somali females.’ Once past persecution on account of a protected ground was established, the court found Ms. Hassan to be entitled to an as of yet un rebutted presumption of a well-founded fear of future harm. The court found that the BIA had not properly shifted the burden of proof to the government with regards to rebutting the presumption with evidence of changed circumstances. In response to the government’s argument that no well-founded fear of harm existed because Ms. Hassan allegedly could not be subjected to FGM again, the court noted that there were *other* prevalent forms of persecution aside from FGM to which Ms. Hassan could be subjected if returned to Somalia. Notably the court wrote, “We have never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past. Our definition of persecution is not that narrow.” *Ibid*, at 518.

¹¹² *Barry v Gonzales*, 445 F.3d 741 (4th Cir. 2006).

¹¹³ *Bah v Mukasey*, 2008 U.S. App LEXIS 12507 (2d Cir., June. 11, 2008). For further grants of asylum and humanitarian protection on the basis of FGM as past persecution and a continuing harm as treated within the US, *see* Frydman & Seelinger, *supra* note 97, at 1083-5.

practise. In the 2004 UK case of *P and M*,¹¹⁴ an 18-year-old woman from Kenya appealed to the Court of Appeal against the decision of the IAT to refuse her asylum claim on grounds of fear of FGM. The claimants father had joined the Mungiki sect in Kenya and performed FGM on the claimant's mother (who died as a result) and sister. She did not want to undergo FGM. Taking note of relevant case-law and objective evidence,¹¹⁵ it was held that the decision of the adjudicator to grant asylum had been correct and that women in Kenya formed a PSG, there was no IFA and no sufficient state protection available.¹¹⁶ The appeal was allowed.¹¹⁷

In, *Annan v Canada*,¹¹⁸ decided in the wake of *Farah*, the claimant, a twenty-three-year-old Roman Catholic woman from Ghana, fled her country when a Muslim religious leader decided that FGM should be done to purify her. The religious leader was acting at the instigation of a local Muslim police inspector's son who, having failed to convince her to marry him, had kidnapped the applicant and, with a few friends, gang-raped her. The Canadian Refugee Division rejected her claim to Convention refugee status on the basis that Ghana was not a Muslim country, that the practice of FGM occurred only in certain parts of the north, that the government did not approve of the practice and that it was about to declare it illegal. Her judicial review was allowed. It was determined that the facts presented demonstrated that the claimants fear was valid. Since it was established that FGM, while officially condemned, was still tolerated in Ghana, there was no basis upon which to conclude that if the applicant returned to her country, she could expect protection from the State. The state's willingness to act must be considered as well as its ability to provide protection. It was further reasoned that an IFA was not available. The panel

¹¹⁴ *P and M*, *supra* note 63.

¹¹⁵ Consulted COI indicated that the police did not intervene in FGM matters and that whilst the Kenyan Government had issued presidential decrees against FGM, further reports indicated that the practice is on the increase rather than decrease. Additionally, the court accepted that the general view of the police in Kenya was that violence against women is regarded as a family matter and not a crime. *Ibid*, para 48.

¹¹⁶ It was determined that the claimant had a well-founded fear of persecution and that State protection for M would be neither adequate nor effective and that there was no reasonable possibility of an IFA in her case. *Ibid*, para 49.

¹¹⁷ The court concluded that, "In these circumstances, it is our view that M's appeal has to be allowed and the decision of the Adjudicator restored. This case did not require and should not have engaged such a sophisticated analysis of the technical requirements of the Refugee Convention. We would have thought that if the story of M was true, she was clearly entitled to asylum. The Adjudicator thought it was, and the IAT should not have intervened. The decision of the Adjudicator should be restored". *Ibid*, para 49. *See also*, para 41-42 detailing the original decision of the Adjudicator.

¹¹⁸ *Annan*, *supra* note 12.

reasoned that Ghana was a small country with largely tribal cultural foundations and it was not unreasonable to believe that the police inspector had the necessary resources at his disposal to obtain information from his colleagues elsewhere in the country and find her wherever she might settle.¹¹⁹

Similarly, in another Canadian case, decided in 2002, the claimant, aged 17, feared persecution in her country of origin by reason of her membership in the PSG women.¹²⁰ She alleged that her father wanted to force her to marry a 65-year-old man, a polygamist and the father of 15 children. The claimant's testimony was found to be credible and the panel reasoned that it was likely she would likely be subjected to FGM. The panel in reaching its decision had engaged the CIRB Gender-Guidelines and available COI, because the feared harm was tantamount to persecution. According to the COI, in Guinea, custom took precedence over written law. It was therefore unreasonable to invoke State protection in this case, even less an IFA.¹²¹ The panel concluded that the claimant was a convention refugee.

The above cases highlight the extent to which gender-guidelines can be effectively used and implemented. These cases are illustrations of good practices utilized by some decision-makers and indicate that if properly trained in gender-sensitive issues pertaining to the persecution suffered by women, decision-makers will either apply the guidelines or interpret them in a gender-sensitive manner.

Considering these positive cases, one might ask: why the need for this thesis? Firstly, FGM claimants continue to be denied protection. Findings from the available jurisprudence has revealed that in FGM cases there is a high degree of inconsistency in seemingly identical fact situations, resulting in disparate outcomes. The application and interpretation of the gender-guidelines is a welcome development, but other obstacles need to be remedied to ensure that FGM claimants are treated in a procedurally fair and gender-sensitive manner. Secondly, a common theme runs throughout the cases, namely, the apparent racial and gender biases and assumptions of decision-makers. Opposition to FGM lies in part in the ideological assumptions about 'non-Western cultures' that direct

¹¹⁹ *Ibid.*

¹²⁰ See, "*Compendium of Decisions*", *supra* note 84, at 25, discussing CRDD MAI-07929, March 13, 2002.

¹²¹ *Ibid.*

the gaze towards particularized cultural practices instead of the overall problem of violence against women. Most of the judgments examined refer to FGM as a practice, tribal custom or a rite of passage. This characterization suggests that decision-makers are failing to recognize that, “FGM is a generalized form of violence aimed at controlling female sexuality”.¹²² Western scholars have similarly adopted this approach, privileging culture-based explanations of gender-related persecution. For example, one scholar, while acknowledging that, “the third world is not alone in failing to accord women sufficient protections”, nonetheless urges asylum recognition for gender-related persecution because “the social relations of many third-world nations are still dominated by religious, tribal, or societal customs which accommodate, if not sanction, the persecution of women”.¹²³ The narrative strategy used to condemn, is reminiscent of anthropological constructions of non-white immigrant cultures as bound by regressive customs and native practices.¹²⁴ According to Sinha, this treatment exemplifies a manifestation of Western discourse, directing a ‘horrificed gaze’ towards its colonial and postcolonial subjects, rather than looking at the complexities surrounding the issue of FGM.¹²⁵ Ultimately the dialogue of FGM utilizes the ‘here versus there’¹²⁶ parlance, creating the illusion that the persecutory act is wholly unlike for example domestic violence which is widespread globally. Perceiving specific forms of gender-related violence as ‘foreign’ has profound consequences for asylum claimants whose claims involve persecution that cannot be blamed on a cultural practice.¹²⁷ Decision-makers, need to ensure that FGM is not merely regarded as a cultural practice. Like the approach adopted in the specialized domestic violence courts, decision-makers need to be trained to understand that FGM, like domestic violence, is a multifaceted form of violence and persecution, which reflects and reinforces

¹²² Asefa S, “*Female Genital Mutilation: Violence in the Name of Tradition, Religion and Social Imperative*” in French S, “*Violence Against Women: Philosophical Perspectives*”, Cornell University Press: New York, (1998), at 100.

¹²³ Neal D, “*Women as a Social Group: Recognizing Sex-Based Persecutions as Grounds for Asylum*”, 20 Columbia Human Rights Law Review 203, (1988), at 206-7 (taking as example women in post-revolution Iran).

¹²⁴ Volpp L, “*Talking ‘Culture’: Gender, Race, Nation, and the Politics of Multiculturalism*”, 96 Columbia Law Review 1573, (1996), at 1588 (“The freezing on non-European culture in such forms as ‘custom’ or ‘practice’ emerges from colonist and imperialist discourse which opposes tradition (East) and modernity (West)...”).

¹²⁵ Sinha, *supra* note 51, at 1585.

¹²⁶ Volpp L, “*Feminism versus Multiculturalism*”, 101 Columbia Law Review 1181, (2001), at 1186.

¹²⁷ Sinha, *supra* note 51, at 1585.

inequities between men and women and compromises the health, dignity, security and autonomy of its victims. While the guidelines at face-value appear to offer the degree of protection sought, their impact is limited. The process in which the guidelines are implemented and interpreted are flawed as they allow bias to continue unabated under the veneer of respectability provided by the guidelines. For the guidelines to be truly effective in achieving their aim the refugee processes of the case-studies must be reformed.

Unconscious bias may affect decision-makers to varying degrees¹²⁸ despite their intentions to apply the gender-guidelines and treat FGM claims in a gender-sensitive manner. Intentional biases and a lack of understanding manifested using cultural relativism arguments and the use of credibility determinations are used to deny FGM claimants protection. These denials as the following section will illustrate, stem ultimately from the limitations of the informal RDP and the non-binding nature of the gender-guidelines.¹²⁹ The caselaw further suggests that these limitations, permit biases and political considerations to influence determinations. Coupled with a lack of experience and training among decision-makers in gender and credibility issues many of the negative determinations are, “simply unsustainable”.¹³⁰ Research has found that immigration officials make wrong decisions in early hearings which must be corrected by immigration judges. It has further revealed that decision-makers do not consistently consider the legal entitlement to protection provided to victims of gender-related persecution under the Refugee Convention; and that case-owners do not consistently consider issues at the heart of gender-related persecution.¹³¹ Thus, some case-owners and decision-makers do not understand the nature of the persecution from which women flee resulting in unsound

¹²⁸ Unconscious bias is identified by psychologists as part of everyone’s social identity: we are each ‘hard-wired’ to respond positively to people we perceive to be like us and to react against people perceived to be too different to ‘fit in’ or to pose a threat to us. Such bias can be the product, for example, of social stereotypes, family influence or experience (real or perceived – e.g. crossing the road to avoid proximity to a group of noisy young men, who may be perfectly harmless.) In the same way as a pleasant memory automatically produces a smile, we respond in very predictable ways to internal messages that we formulate and send to ourselves. See, Turnbull H, “*The Illusion of Inclusion: Global Inclusion, Unconscious Bias and the Bottom Line*”, Business Expert Press: New York, (2016).

¹²⁹ Refer to Chapter Two’s discussion on the structures and processes of the asylum decision-making bodies of the respective case-studies.

¹³⁰ Muggeridge H & Maman C, “*Unsustainable: The Quality of Initial Decision-Making in Women’s Asylum Claims*”, Asylum Aid, (2011), at 5. This UK report produced by Asylum Aid can be accessed via the Asylum Aid website at <http://www.asylumaid.org.uk/data/files/unsustainableweb.pdf> (last accessed 1/6/17).

¹³¹ *Ibid*, at 5-7.

credibility denials. For example, in a 2011 report by Asylum Aid, it was revealed that at one refugee hearing, because the decision-maker had never heard of ‘female circumcision’ the claimant was found to lack credibility.¹³² Furthermore, this report has also revealed that COI and case-law have been used selectively or unrepresentatively to justify denials; gender-guidelines have not been enforced; and women seeking asylum have been affected by a lack of legal representation.¹³³ These operational, procedural, and substantive issues and how they negatively affect claimants seeking refugee status based on an actual or perceived fear of FGM within the case-studies will now be examined.

B. ‘Bad Judgment’ or Failure to Apply Gender-Guidelines?

1. Procedural Issues

Procedural matters can mean that gender issues may not come to light at an early stage within the RDP. This section reviews several procedural issues commonly experienced by female claimants. Specifically, it deals with the impediments of filing deadlines, poor legal representation and the failure to consult or apply the gender-guidelines. The issue of credibility will be examined in Section III because of its complex nature and the wealth of FGM credibility denials.

A. Time-Limits

The imposition of deadlines, where the failure to meet the time-limit extinguishes any form of claim, is an exceptionally unfair and arbitrary measure, particularly for those seeking refugee status. The US is the only one of the top five refugee-receiving countries that mechanically applies a time bar to asylum claimants,¹³⁴ and will be the focal point of

¹³² *Ibid*, at 6.

¹³³ *Ibid*, at 6-7.

¹³⁴ See, United Nations High Commissioner for Refugees, “*Asylum Levels and Trends in Industrialized Countries, 2005: Overview of Asylum Applications Lodged in Europe and Non-European Industrialized Countries in 2005*”, March (2006), available online at <http://www.unhcr.org/uk/statistics/country/44153f592/asylum-levels-trends-industrialized-countries-2005.html> (last accessed 28/7/17).

discussion here. Since 1996, Congress amended laws to bar asylum, regardless of the merits of the claim, for any claimant who fails to apply within one year of entering the US, unless the claimant qualifies for an exception.¹³⁵ Since the one-year bar came into effect, the Department of Homeland Security has rejected on the deadline more than 5,000 asylum applications (affecting more than 21,000 refugees) that would otherwise have been granted.¹³⁶ Research has revealed that women tend to be more adversely affected by the deadline, as they are more likely to file later than men.¹³⁷ Furthermore, if claimants know nothing about the legal system (which is likely) and as women feel like they have no expectation that they will receive help, many will not even be aware that they must apply for asylum.

The rationale for such procedural restrictions are murky: it appears that the US was attempting either to fix a problem of systematic delays that had already been resolved, or to “triage weak asylum claims with an instrument so blunt that it undermines the asylum process”.¹³⁸ Anecdotal evidence has suggested that the one-year deadline imposes unfair denials of asylum on claimants, resulting in deportations.¹³⁹ It also puts additional pressure on those involved in refugee determination. Evidence has found that credible refugees who could be granted asylum are being shifted into the immigration courts, wasting scarce government resources.¹⁴⁰ It has also been said that, investigating compliance with the filing deadline is time-consuming for decision-makers who are

¹³⁵ Schrag P, *et al*, “*Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*”, 52 William and Mary Law Review 651, (2010), at 652.

¹³⁶ Schrag *et al*, *supra* note 135, at 653.

¹³⁷ Ramji-Nogales J, “*In the US, a filing deadline hinders asylum seekers*”, (2010), available online at <http://madikazemi.blogspot.com/2010/10/in-us-filing-deadline-hinders-asylum.html> (last accessed 1/7/17).

¹³⁸ Schrag *et al*, *supra* note 135, at 655.

¹³⁹ See generally Human Rights First, “*The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency*”, (2010), available online via the Human Rights First website at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf> (last accessed 24/6/17) (reporting more than two dozen case examples of refugees rejected for asylum because of the deadline); Musalo K & Rice M, “*The Implementation of the One-Year Bar to Asylum*”, 31 Hastings International and Comparative Law Review 693 (2008) (providing case studies that illustrate the negative impact of the one-year deadline).

¹⁴⁰ See, Eliminate the Arbitrary One-Year Bar to Asylum: Co-Sponsor the Restoring Protection to Victims of Persecution Act (H.R. 4800), available online at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/4-20-10-support-for-HR4800.pdf> (last accessed 17/7/17). (Hereafter referred to as the Eliminate the Arbitrary One-Year Bar to Asylum).

already overloaded and diverts time away from evaluating the merits of the asylum case.¹⁴¹

As previously noted the only exception to the one-year deadline is if a claimant can prove that they have a “changed” or “extraordinary” circumstance that would excuse a delayed filing. Whilst Congress claimed that the statutory exceptions should guard against the exclusion of bona fide refugees, these exceptions have not prevented refugees with well-founded fears of persecution from being denied asylum. In many cases, they have been applied narrowly or inconsistently with Congressional intent, failing to account for many reasons why bona fide claimants would not file within one year.¹⁴² For example, decision-makers have denied exceptions to refugees who suffer from psychological conditions such as post-traumatic stress disorder.¹⁴³ It needs to be acknowledged that victims of FGM and other forms of gender-based violence may initially avoid applying for asylum out of fear of stigmatization, and/or because asylum may mean not only severing their ties with their country, but also with family and other community members. Additionally, exceptions are not usually recognized when claimants did not know about asylum filing deadline, or were unable to find affordable legal representation.¹⁴⁴ The deadline denies protection to genuine claimants for exceptions beyond their control and having nothing to do with the merits of their case. For example, in one documented case, a claimant from Senegal who had fled a forced marriage and FGM was denied refugee status because the filing deadline and ordered deported.¹⁴⁵ The claimant had been in the US for four years, explaining that she believed that the practice would change in Senegal following the prohibition of FGM and that she could return home. However, having been informed of her sister’s circumcision and realizing that she was still at risk, she

¹⁴¹ *Ibid*, at 2.

¹⁴² *Ibid*.

¹⁴³ Hereafter referred to as PTSD. Such psychological conditions can make it very difficult for claimants to provide a detailed explanation of their past in an asylum application and may even prevent them from meeting deadlines etc.

¹⁴⁴ Eliminate the Arbitrary One-Year Bar to Asylum, *supra* note 140, at 2.

¹⁴⁵ The claimant was a member of the Djola ethnic group, which practices FGM and was, informed that she had to undergo FGM and enter into an arranged marriage with a man forty years her senior. She refused and sought protection from the police who declined to intervene. This case was reported in Eliminate the Arbitrary One-Year Bar to Asylum, *supra* note 140, at 3. *See also*, Tamber C, “Asylum denied in Female Circumcision Case”, (2009), available online at <http://fgcdailynews.blogspot.com/2009/09/asylum-denied-in-female-circumcision.html> (last accessed 7/3/17).

subsequently applied for asylum. Despite being described as “genuinely credible” with substantial COI supporting her account that FGM continued to be practiced despite its prohibition and that she would be subjected to it, she was denied protection as she had not filed her claim in time.¹⁴⁶ As discussed in Chapter Two, the case-studies have implemented mechanisms to limit access to refugee determination and control refugee flows.¹⁴⁷ Unquestionably, the use of time-limits on filing claims is one example of this and these mechanisms, permit politicians and decision-makers, to exercise their power and discretion to interpret refugee law and policies in a manner which legitimately restricts protection and consequently vital resources, including State benefits.

Applications filed after the one-year deadline will only be considered if *changed* or *extraordinary circumstances* related to the delay are found by the decision-maker, and if filing was made within a ‘*reasonable time*’ after the occurrence of such circumstances.¹⁴⁸ The ‘changed circumstances’ exception applies not only to changed COI but also to activities in which the claimant had become involved, outside of her own country, that placed her at greater risk.¹⁴⁹ The regulations define ‘extraordinary circumstances’ as including (1) serious physical or mental illness; (2) legal disability, i.e. an unaccompanied minor; (3) improper conduct by legal advisors; (4) the claimant having other lawful status in the US; and (5) the death or serious illness of a family member or legal representative.¹⁵⁰ The regulations do not list ignorance of the need to seek asylum, or of the existence of the deadline, as an extraordinary circumstance. This is arguably deliberate

¹⁴⁶ In considering her eligibility for withholding, the judge noted that there might indeed be a “reasonable possibility” that she would be subjected to FGM on return, but concluded that she did not meet the higher “more likely than not” standard for withholding of removal. The BIA agreed. The U.S. Court of Appeals for the Fourth Circuit, in declining to overturn the denial withholding, also noted that “there is evidence in record that tends to support [her] claim that if she returns to Senegal, she will face a risk of FGM,” and the dissenting judge wrote that the woman “presents a mountain of evidence that clearly demonstrates that the likelihood of her being forced to undergo FGM is certainly 100%.” The claimant even filed a petition asking the US Supreme Court to review the decision, but the petition was not granted.

¹⁴⁷ In the US, these mechanisms are codified within the IIRIRA which made extensive changes to the asylum process: establishing expedited removal proceedings; codifying many regulatory changes; limiting judicial review in certain circumstances; and more importantly for the purposes of this discussion, added time limits on filing claims.

¹⁴⁸ INA Act, Section 208(a)(2)(D), 8 U.S.C. Section 1158(a). Clearly, it is critical to avoid filing beyond the one year deadline. Aside from being held to the higher probability standard of withholding of removal should asylum be precluded, an applicant found statutorily ineligible for asylum will not have the advantage of eligibility for humanitarian asylum based on the severity of her past FGM. *See*, Frydman & Seelinger, *supra* note 97, at 1085-6.

¹⁴⁹ 8. C.F.R. section 208.4 (a) (4) (2010)

¹⁵⁰ *Ibid*, section 208.4 (a) (5).

to justify denials and only serves to undermine the objectives of the gender-guidelines. The extraordinary circumstances proscribed in the regulations are illustrative and not exhaustive, meaning that decision-makers may award exceptions that are not specifically described therein.¹⁵¹ In fact, one training manual specifically states that other reasons not listed in the regulations which may prevent a claimant from applying within a year, include, “severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization”.¹⁵² Decision-makers therefore have discretion in such cases and significant leeway for the expression of judicial preferences, which derive from political, social, or economic views.

The deadline requirement has been described as harsh, unfair¹⁵³ and arbitrary.¹⁵⁴ Karen Musalo and Marcella Rice examined 286 cases involving the one-year deadline¹⁵⁵ and concluded that it, “causes the *refoulement* of legitimate refugees.....leads to arbitrary and disparate outcomes, deters *bona fide* claims, and squanders precious administrative resources”.¹⁵⁶ They claim that decision-makers apply the exceptions to the regulations formalistically and without regard to the manual’s instructions.¹⁵⁷ Similar, research undertaken by Human Rights First¹⁵⁸ has also found that the deadline, “is barring legitimate refugees with well-founded fears of persecution from receiving asylum in the US and is leading to the unnecessary expenditure of government resources”.¹⁵⁹ The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, states that technical problems should not bar consideration of a legitimate asylum claim. Yet, this is exactly what the US is doing. The 1967 Refugee Protocol further states that, no State should expel or refoul a refugee to a territory where their life or freedom would be

¹⁵¹ *Ibid* (stating extraordinary circumstances are not limited to the enumerated list).

¹⁵² Schrag, *supra* note 135, at 673-4.

¹⁵³ *Ibid*, at footnote 106.

¹⁵⁴ *See*, Musalo & Rice, *supra* note 139, at 712.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*, at 722.

¹⁵⁷ *Ibid*, at 697, 699 (stating that, “asylum officers must be flexible and inclusive in examining changed or extraordinary circumstances, if credible testimony or documentary evidence relating to an exception exists”).

¹⁵⁸ Human Rights First examined case files of asylum claims that were handled by lawyers to whom it had referred potential clients. *See*, Human Rights First, *supra* note 139, at 1.

¹⁵⁹ Human Rights First, *supra* note 139, at 1.

threatened on account of a persecution ground. In denying protection because of a filing deadline technicality¹⁶⁰ and returning a claimant to a country where she faces persecution,¹⁶¹ the US is in breach of its obligations.¹⁶²

The goal of matching asylum grants precisely to those individuals who have a well-founded fear of persecution has been undercut by the enactment of the one-year filing deadline. The narrative and data obtained from examined case-law and reports, and detailed below reveal that the US is not living up to its international obligations. It further reveals that application of the one-year bar renders the INS gender-guidelines useless, and reinforces the need for a gender-sensitive RDP. The deadline fails to address the unique position of women fleeing gender-based forms of violence and their needs within the RDP. Consequently, FGM claimants face great challenges in obtaining refugee status. Whilst it was hoped that the deadline would reduce the volume of non-meritorious claimants, this is not the case and as the following discussion will reveal, many genuine FGM claimants have been denied protection.

I. The One-Year Bar Does Not Prevent Fraud

A plethora of cases exist where claimants have been found credible but denied refugee status because of the one-year bar. In many of these cases, a wealth of COI and other evidence was presented to substantiate claims. For instance, in one case the asylum request of an advocate for women's rights was rejected based on the filing deadline. The difficulties which she endured once she reached the US were not considered as exceptions.¹⁶³ A native of Cameroon, the claimant was an outspoken advocate for the rights of women, especially on issues relating to domestic violence, FGM, and reproductive health. She worked for the United Nations and organized events to raise

¹⁶⁰ See, Musalo & Rice, *supra* note 139, at 711.

¹⁶¹ *Ibid.*

¹⁶² See, for example *Matter of Anon* (2005), as cited in Musalo & Rice, *supra* note 139, footnote 54. In that case a Guinean woman, who at the age of six was subjected to FGM. She then refused an arranged marriage to a man almost fifty years her senior. She was beaten by her uncle, who threatened to end her life. She fled to the US where she went on to give birth to two daughters. If returned to Guinea she risked death for dishonouring her family and feared that her daughters would be subjected to FGM. The immigration judge denied asylum because of the one-year deadline and ordered her deported.

¹⁶³ See, Human Rights First, *supra* note 139, at 36 (discussing case HRF case 96746).

awareness.¹⁶⁴ She also spoke out against the corrupt practices of government officials. Because of her activism, the claimant and her family were threatened and detained by a local tribal ruler, and their house was set on fire. She fled to the US but was homeless for long periods of time, during which she slept on park benches and on church floors. After, the claimant found a permanent residence, she learned about asylum and applied soon thereafter without an attorney. The asylum officer who interviewed the claimant told her that he believed her story, but he rejected her case based on the filing deadline after finding that she was not eligible for an exception.

The available data also includes numerous cases where the claimant was denied refugee status because of the time bar, but granted a different form of protection from persecution, such as relief under the Torture Convention. In the US, a claimant for withholding of removal or relief under the Torture Convention must demonstrate at least a 51% chance that she will be persecuted or tortured in her home, while a claimant for asylum need only show a 10% chance of persecution. This means that a decision-maker has not only determined that such claims are non-fraudulent, but also that these claims have passed an even more rigorous test than that required for asylum. Unfortunately, however, for claimants who receive, these alternative forms of protection, they are faced with strict limitations. Unlike an asylum seeker, claimants are ineligible for many societal benefits, lacks residency status or citizenship, and, above all, have no possibility of family reunification. In one case, a Tanzanian woman whose parents were involved in an opposition political party sought refugee status.¹⁶⁵ A local policeman demanded that the applicant marry him and undergo FGM, even though she was already married. Because of her refusal, her parents were detained by the police and tortured. The claimant was then taken into custody in exchange for her parent's release. She was raped, beaten, burned and left naked in her cell. She escaped and fled to the US where she was exploited for financial gain. She filed for asylum eighteen months after her arrival. Because of the one-year bar, she was denied asylum but awarded protection under the Torture Convention. She will never be able to reunite with her children who remain in Tanzania.¹⁶⁶

¹⁶⁴ *Ibid.*

¹⁶⁵ CGRS Case No. 1394, as cited in Musalo & Rice, *supra* note 139, at 701.

¹⁶⁶ *Ibid.*

In another case, a Gambian mother who was married against her will at the age of fifteen, subjected to FGM, suffered domestic violence and repeated rapes, witnessed the beating of her children, fled to the US.¹⁶⁷ As part of her asylum application, she submitted evidence that she suffered from PTSD, resulting from the years of violence which she had endured. Despite this, the immigration judge denied asylum because of the one-year bar and granting withholding of removal.¹⁶⁸ In a similar case, a woman from the Kikuyu tribe in Kenya had escaped being subjected to FGM because of her parents' opposition. Members of the Mungiki sect attacked and raped her because she was one of a very few girls in her village who had not undergone the custom. She joined a woman's group and educated young girls about FGM and forced marriage. While helping a girl escape a forced marriage, the claimant was caught, imprisoned and tortured. The immigration judge granted withholding of removal but denied asylum as she had failed to meet the filing deadline.¹⁶⁹ In another case, an Ethiopian woman who had undergone FGM and other violence due to an imputed connection to an anti-government political group could not establish clear and convincing proof of her entry within one year of application. Asylum was denied, but relief under the Torture Convention and withholding of removal was awarded.¹⁷⁰ These examples illustrate that it is common for a decision-maker to deny asylum based on the deadline and then – in the same determination - find that it is more likely than not that a claimant will be subjected to torture or persecution upon her return. Clearly, therefore, this is adversely affecting genuine claimants. More, disturbing, is the reality that other victims of gender-based violence barred from asylum by the filing deadline, are unable to meet the burden of proof for subsidiary protection and are denied all forms of protection.

II. Regulatory Exceptions are Denied

Another finding from the examined FGM case-law is that decision-makers are repeatedly denying cases with regulatory exceptions. It is apparent that decision-makers are ignoring

¹⁶⁷ *Ibid*, at 700, discussing CGRS Case No. 1394.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*, at 702, discussing CGRS Case No. 3154.

¹⁷⁰ *Ibid*, discussing CGRS Case No. NC0013.

PTSDs and replacing expert testimony with personal speculation and conjecture about the behavioural impacts of psychological disorders. As will be discussed in due course, decision-makers commonly misunderstand or ignore the phenomena of ‘avoidance symptoms’ typically experienced by PTSD claimants.¹⁷¹ According to the American Medical and Psychiatric Associations, individuals suffering from PTSD tend to avoid, “people, places, thoughts, or activities that bring back memories of the trauma”.¹⁷² Musalo and Rice, argue that any decision-maker who accepts that a claimant is suffering from PTSD, but rejects the causal connection between the disorder and the delay in filing fails to recognise the phenomena of avoidance symptoms¹⁷³ and in the opinion of this researcher is not appropriately applying the gender-guidelines. Some decision-makers have concluded that if PTSD has not prevented a claimant from attending church, marrying, having children, or studying within their first year of arrival, that is cannot have delayed the application for asylum. This overlooks the reality that the RDP requires the claimant to describe in detail the events of her torture, on numerous occasions and before governmental officials. Studying and praying do not involve re-traumatization. For instance, in the case of the Kenyan woman fearing FGM from the Mungiki sect, discussed above, the claimant had applied for asylum after the one-year deadline and submitted evidence of her diagnosis of PTSD and Depressive Disorder. The evidence documented her impaired ability to function, however, the decision-maker concluded that those disorders could not have contributed to her delay in filing as she had attended Church during her first year in the US.¹⁷⁴ In another case, the claimant’s mother and grandmother helped her escape FGM as a child. She was later forced into a polygamist marriage and her husband attempted to perform FGM on her. She attempted suicide and was hospitalised for months. She was then repeatedly raped and subjected to violence by her husband. She fled Kenya and, arrived in the US on a tourist visa and applied for asylum after the deadline had passed. Her PTSD was accepted by the immigration judge but

¹⁷¹ Khandwala L, “*The One Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*”, Immigration Briefings, (2005), at 7.

¹⁷² See PTSD Patient Page 286 JAMA 630, at 630, (2001) & Diagnostic Manual, American Psychiatric Association, 309.81 Post-traumatic Stress Disorder (2000), both cited in Shome S, “*One Year Bar*”, May 2007 (unpublished manuscript on file with the GCRS), at 4.

¹⁷³ Musalo & Rice, *supra* note 139, at 703.

¹⁷⁴ *Ibid*, discussing CGRS Case No. 3267.

rejected that it was directly related to her delay in filing on time. It was determined that the claimant had exhibited ‘entrepreneurial skills’ by caring for children to raise money while she was homeless and because her application was well-written and articulate. Asylum was denied, but she was granted withholding of removal.¹⁷⁵ Even more alarming are those cases where the failure to recognise psychological trauma results in the denial of all relief. In those cases, claimants are sent back to the country of persecution. In the aforementioned case, the decision-makers disregard for expert testimony and reliance on personal speculation and conjecture is conspicuous.

III. ‘Reasonable’ Period of Time & Changed/Extraordinary Circumstance

In respect of changed/extraordinary circumstances, it is also evident from the data that decision-makers believe waiting longer than six months after a changed or extraordinary circumstance is presumptively unreasonable. This presumption is, arguably, not in accordance with the relevant statute which states that, the filing must be made within a ‘*reasonable time*’ after the occurrence of such circumstances. When Congress enacted the one-year bar, it made explicit its understanding that twelve months was a reasonable time within which to file for asylum.¹⁷⁶ Arguably, after the occurrence of the facts which give rise to the claim, claimants should be allowed one year within which to file. Both the Department of Justice and the Department for Homeland Security appear to have embraced the six-month presumption in denying asylum claims. It does not, however, apply the logical inverse counterpart of that presumption where it would benefit the claimant. For instance, a claimant from Togo filed her asylum application five months after her student visa reinstatement application was denied. Her application for asylum was denied for failure to satisfy the one-year deadline despite her fear that her parents would force her, like her two older sisters, to undergo FGM.¹⁷⁷

In another case¹⁷⁸ a Gambian claimant facing a clear probability of persecution was denied an exception because she waited eight months after her baby’s birth to file for

¹⁷⁵ *Ibid.*

¹⁷⁶ Musalo & Rice, *supra* note 139, at 710.

¹⁷⁷ *Ibid.*, discussing CGRS Case No. 4517.

¹⁷⁸ Musalo & Rice, *supra* note 139, at 710

asylum. The claimant who had undergone FGM applied for asylum after her daughter was born in the US because she wanted to protect her daughter from the practice. The immigration court acknowledged that the daughter's birth qualified as a changed circumstance, but did not grant an exception to the filing deadline because the claimant had waited eight months after the birth to file. The court considered eight months to be unreasonable even though, during this time, the claimant was postpartum, and caring for a child who suffered from severe asthma and microcephaly. The BIA upheld the immigration judge's denial of asylum, but accepted that she faced a clear probability of persecution, and extended her withholding of removal.

These cases illustrate that even claimants who can demonstrate 'extraordinary' or changed' circumstances are still being denied protection because some decision-makers do not feel that they have filed within a 'reasonable time'. The '*reasonable time*' criteria is a common formulation, used particularly in judicial and quasi-judicial forums, and this criteria, regardless of which context it is used in will be construed differently by different judges and decision-makers. In fact, research pertaining to the one-year deadline has found that those who filed less than two years after entry to the US were rejected at a rate of 32%, but those who filed more than two years after entry were in every case examined, rejected at a rate of at least 57%.¹⁷⁹ Thus, it seems that the longer the lapse, the more likely a claimant will be rejected. This is worrying considering the fact that in the research analysis, it was found that women had a rate of untimely filing 13% higher than men.¹⁸⁰ Furthermore, it was revealed that women filed very late claims at a rate more than 50% higher than men. Almost 10% of these women filed at least four years after entering the US.¹⁸¹ This difference, it is argued can be attributed to the nature of the persecution suffered, which makes women reluctant to discuss their experiences. It is further suggested that, FGM victims miss the deadline because they face a multitude of barriers to securing representation, including a lack of knowledge about the deadline and its expectation as well as about the legal system and procedures generally, limited financial resources, lack of time and resources to look for legal counsel, and language and cultural

¹⁷⁹ Schrag, *supra* note 135, at 721.

¹⁸⁰ *Ibid*, at 702.

¹⁸¹ *Ibid*.

barriers. This is supported by the finding that female claimants who filed late were represented at a higher rate than men – perhaps because women who did not have legal representation did not know that they were eligible for asylum.¹⁸²

Thus, decision-makers trained in gender issues will be more aware of the issues affecting victims of FGM and the impediments to their ability to file within a reasonable time. Judges and other personnel trained within the specialised domestic violence courts are taught that victims of domestic violence stay with their abusers for a plethora of reasons and it is only when they feel empowered, unsafe or face the risk of losing their children that they decide to seek help. Domestic violence victims do not always seek help right away, in some instances it may take years for them to do so. Should their abuse be dismissed because it was not brought within a ‘*reasonable time*’? No, the specialised domestic violence courts are aware of the difficulties facing such victims and the difficulties preventing them seeking assistance from the courts. Thus, the legal protection and victim support advocated within the domestic violence courts needs to be implemented within the RDP to ensure FGM claimants are not disadvantaged by restrictive immigration time limits. Arguably the “changed circumstances” and “extraordinary circumstances” exceptions do not remedy the problems created by filing deadlines. Legitimate claimants are denied asylum, sometimes because decision-makers inappropriately deny them exceptions, sometimes because they decide that they did not file timely even given the exception, and sometimes because decision-makers decide the exceptions do not apply to the claimant’s circumstances. As will be elaborated upon in the next section and more comprehensively in Chapter Four, a possible solution to this unlimited discretion would be the rotation of decision-makers within the RDP. Rotation can help to identify bias and consistent denials among decision-makers, but more importantly, as evident from the domestic violence courts, rotation also increases interactions among decision-makers, legal representatives and other interested parties, expanding networks, and leading to cross-pollination and the sharing of ideas. This approach could help to improve understandings of gender violence, increase use of the gender-guidelines and advance interpretations of the deadline exceptions in a gender-sensitive manner.

¹⁸² *Ibid.*

IV. The One-Year Bar Causes Numerous Other Adverse Policy Considerations

With virtually unfettered discretion, arbitrariness of the one-year deadline goes unchecked. One-year bar determinations are dependent upon the decision-maker assigned to the case who, “vary widely in the weight they assign to psychological evaluations and differ dramatically in the degree to which they understand why an asylum seeker might not come forward immediately”.¹⁸³ Others have reported that the level of sympathy a case receives determines the outcome of the case’s one-year issue.¹⁸⁴ In one examined FGM case, a Kenyan woman, whom the police abused for her involvement with a political opposition group, feared being subjected to FGM after two of her sisters were subjected to it and one died from complications. She fled to the US and subsequently married a US citizen. Her spouse filed an immigration petition on her behalf but as the marriage collapsed, he withdrew his petition and alleged that the marriage had been a scam. By this time the claimant had been in the US over a year. The immigration judge reasoned that the claimant, “should have known” that her marriage was in trouble and that she would need to find an alternative status to maintain a lawful presence. The judge used the one-year bar to deny her asylum claim but granted withholding of removal and protection under the Torture Convention. On appeal, the BIA sustained the denial of asylum and reversed the grants.¹⁸⁵

In another case, a Gambian woman was subjected to FGM and fled to the US in 1994, three years before the one-year bar came into effect. A non-lawyer helped her to fill out her asylum application. While in the US, she gave birth to seven children, including several daughters. She feared that they would be subjected to FGM. Her attorney promised but failed to update her application to include FGM in her claim. He later disappeared requiring her to make court appearances without any representation. In 2003, she obtained new representation and immediately filed an amended application and supporting documents which included the FGM claims. Neither the government attorney nor the immigration judge objected to the amended application. A few months later, the case was

¹⁸³ Musalo & Rice, *supra* note 139, at 712.

¹⁸⁴ *Ibid*, at 713.

¹⁸⁵ *Ibid*, discussed CGRS Case No. 4244.

transferred to another immigration judge for the merits hearing. The judge found the claimant eligible for asylum but reasoned that the claimant should have filed an amended application within one year of the one-year bar coming into effect and found that no exception applied. She was also found ineligible for withholding of removal. After her attorneys filed an extensive brief on appeal, the BIA remanded and ordered the immigration judge to grant asylum.¹⁸⁶

Furthermore, in addition to causing excessive referrals from the asylum office, deterring legitimate asylum claims, and disproportionately impacting upon detained persons and unaccompanied minors among others,¹⁸⁷ the filing deadline begets covert settlements. In fact, some attorneys have reported that DHS counsel have sometimes offered withholding of removal or relief under the Torture Convention for the claimants' withdrawal of their asylum claims.¹⁸⁸ In one documented case, a claimant from Mali was subjected to FGM as a child. After the birth of her daughter in the US she applied for asylum based on her fear that her daughter would also be subjected to FGM. Terrified of losing her asylum claim and being forced to return to Mali, the claimant agreed to withholding, stranding her 7-year-old child in Mali with no prospects of reunification. Whilst, the settlement of cases can be a useful and appropriate means to clear crowded court lists, within the RDP, it is not clear that offering an asylum claimant withholding of removal is a good idea. The fact that a "terrified, psychologically stressed, financially impoverished"¹⁸⁹ claimant accepts such a deal does not necessarily mean that the US is living up to its international obligations. It is, undoubtedly a mechanism used to avoid having to support refugees out of State resources.

In addition to highlighting the extent to which the RDP is flawed, the use of time-limits further raises several additional issues affecting both the implementation and interpretation of the INS gender-guidelines. Whilst the guidelines were not referred to in any of the available decisions, the obvious lack of gender-sensitivity and understanding inherent throughout the judgments is worrying, particularly in respect of cases dealing

¹⁸⁶ *Ibid*, discussing CGRS Case No. 1162.

¹⁸⁷ For further information on how the one-year bar affects these individuals and impacts on issues *see*, Musalo & Rice, *supra note* 139, at 714 -722.

¹⁸⁸ *Ibid*, at 719.

¹⁸⁹ *Ibid*, at 721.

with forced marriages and PTSD, suggesting that even in cases where decision-makers may be aware of the guidelines their own biases are prevailing. Arguably, such sentiments highlight the extent to which decision-makers need to be continually trained to better understand the issues facing FGM claimants.¹⁹⁰ Each of the examined gender-guidelines encourage training to a limited degree: implementation of this provision and further reform is essential as it will lead to better decision-making and help to eradicate the ‘culture of disbelief’¹⁹¹ and the cultural and gender biases prevailing among decision-makers.¹⁹² In many of the domestic violence courts examined for this thesis, judges, court personnel and other interested parties, such as victim advocates, receive training on domestic violence issues before commencing any assignments. Training sessions and written materials dispel the myths surrounding domestic violence and address special issues and applicable law relating to immigrants and non-English speaking parties. Similar mandatory training is needed for all involved within the RDP. Perhaps, if the gender-guidelines been applied in the cases examined by qualified and experienced decision-makers, a more pragmatic approach would have been taken which would arguably have produced more equitable outcomes.

The case-law and research pertaining to the one-year bar has demonstrated that women fleeing FGM face a multitude of hurdles and many genuine claimants are being rejected. In order to overcome these obstacles, reform is needed. Specifically, training should be rolled out to all in the RDP to enable them to take into account the unique challenges claimants face when deciding whether they meet the deadline or qualify for an exception. Furthermore, decision-makers need to be made aware that a delay of more than

¹⁹⁰ Ceneda & Palmer, *supra* note 23, at 47.

¹⁹¹ This culture of disbelief essentially refers to the trivialization by western states and decision-makers of refugee women’s experiences of gender-based violence, and in doing so essentially passes them off as religious, cultural or societal traditions, which they either have no right or authority to pass judgment on.

¹⁹² *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995, Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service, USA, at 18-19 (hereafter referred to as the INS Gender Guidelines); *Asylum Gender Guidelines*, Immigration Appellate Authority, UK, Nov. 2000, (hereafter referred to as the UK Gender Guidelines). In Annex 1 to these guidelines whilst it does not specifically elaborate on the training requirements for decision-makers, it does refer to the UNHCR Gender Sensitive Techniques for Interviewing Women Refugees. *See also*, *Women Refugee Claimants Fearing Gender-Related Persecution - Guidelines* issued by the Chairperson pursuant to section 65(3) of the Immigration Act, Immigration and Refugee Board, Ottawa, Canada, 9 Mar. 1993 (updated 2006). Please refer to footnote 32 and D(3), (stressing the need for specially trained interpreters and refugee claims officers in dealing with violence against women and recognising the specific protection needs of women refugee and asylum-seekers).

six months might be reasonable and compulsory use of the gender-guidelines must be mandated. As discussed in Chapter Two, and as will be reinforced throughout this chapter, random factors, such as the identity of decision-makers, deeply affect the RDP. The use of filing deadlines by States, specifically the one-year deadline enforced in the US adds an additional random factor, because it is not, nor can it be, evenly applied to all claimants. First, various groups of claimants are deemed timely in differing degrees, probably reflecting not only differences in immigration support systems that advise claimants to file promptly, but also the extent to which different decision-makers apply strict or generous evidentiary standards in determining entry dates. Decision-makers grant exceptions to late claimants at rates that differ for different groups etc.¹⁹³ Thus, even aside from the inherent unfairness of refusing asylum, to people for reasons beyond their control, some have argued that the deadline introduces irrelevant sociological factors, such as the existence of co-ethnic support groups in the claimant's community, and factors related to the attitudes of decision-makers, into the determination of who obtains refugee status.¹⁹⁴ The uses of deadlines have not been, and probably cannot be, administered in a manner that treats late claimants fairly and equally. The best solution to these problems is to repeal them.¹⁹⁵

B. Representation

Problems with the quality of decision making on asylum claims are compounded by a lack of high quality legal advice. Without good legal representation, women struggle to get their protection needs recognised and will find themselves at risk of destitution or deportation. According to Ramji-Nogales having legal representation is “the single most important factor affecting the outcome of an asylum case.”¹⁹⁶ Refugee claimants however, often have difficulty finding affordable, trustworthy representation to help them with asylum applications. Many claimants lack information about the legal and immigration

¹⁹³ Schrag, *supra* note 135, at 770.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ Ramji-Nogales J, *et al*, “*Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*”, NYU Press: New York, (2009), at 287.

systems and do not understand how to file an asylum claim, which requires a particularly complex legal argument. The inability to obtain representation, therefore, renders some genuine claimants ineligible for asylum. A 2010 study by the Transactional Records Access Clearinghouse at Syracuse University revealed that, “only 11 percent of those without legal representation were granted asylum; with legal representation, the odds rose to 54 percent.”¹⁹⁷ Arguably, representation can increase a claimant’s chances of gaining asylum¹⁹⁸

Without representation, claimants may have poorly prepared applications, possibly with vital information and details missing which can result in their claims being denied. The following case illustrates these difficulties and reinforces the superiority of binding regulations over the gender-guidelines and highlights the flaws of the US RDP. In the case of *Barry*, the Fourth Circuit determined that where a claimant had been subjected to FGM but whose lawyer had failed to present such evidence, the claimant would have been eligible for asylum.¹⁹⁹ However, when Ms. Barry’s original counsel did not present evidence of her past FGM in Guinea, the claimant’s motion to reopen her BIA denial of asylum failed when the court reasoned that she had not complied with *Lozada* measures²⁰⁰ regarding presenting an ineffective assistance of counsel motion.²⁰¹ According to the *Lozada* measures, a claimant asserting ineffective assistance of counsel must (1) provide

¹⁹⁷ TRAC: Asylum Denial Rate Reaches All Time Low: FY 2010 Results, a Twenty-Five Year Perspective, (2010), available online at <http://trac.syr.edu/immigration/reports/240/> (last accessed 20/6/17). See also, U.S. Government Accountability Office, U.S. Asylum System, “*Report to Congressional Requesters: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*”, 30, GAO, (2008). This document is available online at <http://www.gao.gov/new.items/d08940.pdf> (last accessed 17/7/17).

¹⁹⁸ Ramji-Nogales, *supra* note 196, at 287.

¹⁹⁹ *Barry v Gonzales*, *supra* note 112, para 10 (“To the extent that Barry presented credible evidence that she was subjected to female genital mutilation . . . Barry has made out a *prima facie* case of persecution that would have entitled her to asylum . . .”).

²⁰⁰ The *Lozada* requirements are currently binding in the US. Information supplied by Lisa Frydman, managing attorney for the Centre for Gender and Refugee Studies.

²⁰¹ See *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), *aff’d*, 857 F.2d 10 (1st Cir. 1988). As will be recalled from Chapter Two, depending on whether or not the claimant is currently in removal proceedings, two processes exist to seek asylum: affirmative applications and defensive applications. In *Barry*, the claimant who was in removal proceedings asserted a claim for asylum as a defense to her removal. However, because her counsel failed to mention this claim at the beginning of her removal process, a motion to reopen had to be filed in order for the claim of asylum to be raised. As previously mentioned, however, the motion to reopen failed as the court determined that the claimant had not complied with the *Lozada* measures. Specifically, Barry asserted that her prior counsel had failed to discover that she had undergone FGM; that the practice of FGM was widespread in Guinea; and that her daughter would likely be forced to undergo FGM if they were removed to Guinea. *Barry v Gonzales*, *supra* note 112.

an affidavit describing her agreement with counsel; (2) inform counsel of the allegation against her and provide her with an opportunity to respond; and (3) indicate whether a complaint has been filed with the appropriate disciplinary authorities, and if one has not been filed, explain why not. In the case at hand, it was determined that Barry did not *substantially* comply with the *Lozada* requirements. With respect to the first requirement, the court reasoned that Barry failed to submit an affidavit demonstrating the scope of her agreement with counsel. Thus, because Barry did not put forth any evidence regarding her discussions with counsel and counsel's concomitant assurances to her, the BIA had no way of determining whether Barry's prior counsel's representation fell below the requisite standard.

As to the second requirement, it was determined that no evidence existed to show that Barry had notified her prior counsel of the allegations or provided counsel with an opportunity to respond while the motion to reopen was pending before the BIA, despite the fact that the court was presented with such evidence which it refused to consider as, it was not part of the certified administrative record.²⁰² Finally, with respect to the third requirement, Barry's filing with the BIA was deemed not to address whether or not she had lodged a disciplinary complaint against her prior counsel, despite the fact that she alleged that she had initially drawn up a complaint but ultimately decided not to file it, she did not notify the BIA. Thus, the court reasoned that the BIA had not abused its discretion with respect to refusing to consider late-offered evidence of FGM, stating that, although it was undisputed that Barry had been subjected to FGM, and that her daughter would likely be subjected to FGM if deported, the BIA correctly determined that the FGM evidence had been available and could have been discovered or presented during the initial deportation proceedings.²⁰³

Whilst the denial of asylum appears to be factually specific, the decision nevertheless indicates that where a claimant has made a timely showing of past FGM, she may be eligible for asylum. Whilst *Barry* appears to be a positive indication of the Fourth Circuit's

²⁰² *Ibid*, "Although Barry points this Court to a letter in which her prior counsel responded to the general allegation that she had been ineffective in her representation, this letter was written six months after the BIA denied the motion to reopen. Thus, because this letter was never presented to the BIA, it is not part of the certified administrative record, and we cannot consider it".

²⁰³ *Barry v Gonzales*, *supra* note 112, para 19.

commitment to protecting women and children fleeing FGM, it nevertheless represents a departure from the protection offered in *Mohammed* and indicates that if the Fourth Circuit was truly as committed to granting asylum and protecting women from persecution as it has indicated, it would not have denied protection, especially considering the fact that there has been discontentment with the use of the *Lozada* requirements and some Circuit Courts have recognized that, strict compliance with *Lozada* is not always required.²⁰⁴ This case highlights the need for good and efficient legal representation and assistance throughout the RDP. In addition to good legal representation, the RDP also needs to recognize that victims of violence need specialized assistance. The RDP needs to establish a victim services unit. Specialist advocates, trained in gender violence, would provide support and assistance to claimants throughout the entire refugee process. They may also refer claimants to appropriate agencies offering shelter, childcare and counselling services.²⁰⁵ Of importance, is the fact that, where legal representation may not be available, they can inform claimants of what the process involves, assist with the completion of legal forms and applications, attend hearings and offer advice where needed. This approach, employed throughout the various domestic violence courts examined, is grounded in the belief that victims of domestic violence should have access to information, education, and other necessary social and economic support to make informed decisions that best reflect their interests and needs. Within the RDP this

²⁰⁴ It is important to note that there is some discontentment with the use of the *Lozada* requirements, which are now almost twenty-three years old. See, Third Circuit Immigration Blog, “*Rukiqi (not precedential): Lozada Everyone, Even Every Law Partner*” (2007), available online at <http://3dcir.blogspot.com/2007/09/rukiki-not-precedential-lozada-everyone.html> (last accessed 13/7/17). This particular web post discusses the case of *Rukiqi v. Gonzales*, No. 05-3979 (3d Cir. Aug. 31, 2007) in which a divided Third Circuit panel ruled 2-1 that if you are complaining about the ineffective assistance of prior counsel, you should file bar complaints against everyone who ever worked on your case, even if some of them were law partners with others. It also raises the question of whether, “the requirements in *Lozada* should be followed today, because the BIA’s roughly 20-year old decision in *Lozada* does not accommodate developments in the past few decades on expanded rights of people in civil proceedings”. *Ibid.* Similar arguments could equally be raised in relation to other developing areas of law. Also, it should be pointed out that, protection from ineffective assistance of counsel (IAC) was called into question under Attorney General Mukasey, who issued a decision known as *Matter of Compean*, that found no right to effective assistance of counsel. In June 2009, current Attorney General Holder vacated that decision, restoring the *Lozada* approach. However, his decision also instructed the Executive Office of Immigration Review to issue a rulemaking procedure to evaluate the *Lozada* framework and determine what modifications should be made. In other words, it’s possible that at some point *Lozada* won’t be the framework for IAC claims. In the interim however, *Lozada* continues to be binding. See, *Matter of Compean*, 24 I & N Dec. 710 (A.G. 2009).

²⁰⁵ *Ibid.*

approach would be beneficial as it empowers women, and creates a sense continuity, support and ensures that claimants are assured of having their voices heard. For FGM claimants this is important as they need to feel confident in disclosing sensitive information which decision-makers will base their determinations on.

The continuity of representation and assistance is particularly important in cases of gender-based persecution because trauma, shame and stigma may affect the disclosure of rape and sexual violence and make disclosing these experiences very difficult. Research emanating from the case-study countries, as discussed above, has revealed that legal representation is costly and not always readily available.²⁰⁶ Consequently, as evident from this case, inexperienced and uninterested legal representatives may be proffered in such cases. Arguably, the fact that Barry's counsel failed to present evidence of her past FGM, reinforces this theory, especially in light of the fact that *Kasinga* which was decided in 1995, had opened the door for the asylum applications of women fleeing FGM. Legal assistance must be made readily available to such claimants, and the key elements of high quality legal representation should include the following (1) professionalism and expertise, which enables the representative to establish the full factual and evidential basis of the case at the earliest opportunity; and (2) the quality of the one to one relationship between the representative and client is viewed as vital to the overall quality of provision as it helps to establish the claimants trust and confidence in their representative and encourages early disclosure of the full facts of the case.²⁰⁷ Evidence from interviews with women undertaken by Asylum Aid, further showed that claimants felt better informed about the RDP and better prepared if they were legally represented.²⁰⁸ They stressed the link between being legally represented and being able to present all the facts of their case. Some women further drew attention to the importance of the legal representative being

²⁰⁶ See, Schrag, *supra* note 135, at 695; Muggeridge, *supra* note 130, at 42; Buckley M, "The Legal Aid Crisis: Time for Action", Canadian Bar Association: Ottawa, (2000), at 43 (stating that "refugee women who make claims of gender persecution are being denied legal aid coverage for their residency applications; even when there is coverage for refugee claimants, the tariffs are so low that lawyers simply refuse cases". Please refer also, to Chapter Two which discusses the representation of claimants within the RDP of the respective case-studies.

²⁰⁷ Review of Quality Issues in Legal Advice: measuring and costing quality in asylum work, March 2010, undertaken by the Information Centre about Asylum Seekers and Refugees on behalf of Refugee and Migrant Justice, in partnership with Asylum Aid and Immigration Advisory Services.

²⁰⁸ Muggeridge, *supra* note 130, at 43.

female and familiarity with gender-related claims such as FGM was valued.²⁰⁹ In the final report, women further described feelings of being ‘let down’ by their legal representatives when abandoned at appeal stages.²¹⁰ The subsequent experience of going to an appeal alone was described as leaving them exposed to the whims of a Judge who may not show sensitivity to the gendered aspects of the claim.²¹¹ One interviewee who had her appeal dismissed said that she felt unable to face the next stage of the process alone.²¹² *Barry*, arguably, did not have such a representative.

Furthermore, as will be discussed in due course, it is apparent that virtually no support was provided to *Barry* from the RDP and BIA when she was going through the process and when it was identified that she has received ineffective assistance from her original counsel. It is evident that the court failed to consider the trauma endured by *Barry* because of this ineffective assistance and having to seek new representation. Furthermore, the case suggests that the INS gender-guidelines were not applied. Whilst, it is recognised that the gender-guidelines would not have made a difference in the hearing before the Immigration Judge as FGM was not raised as an issue, arguably had the guidelines been binding on the decision-makers (who addressed the motion to reopen the FGM claim) and utilized, their legal-statutory status would have placed them on an equal footing with the *Lozada* measures. This would have eroded the importance of the procedural deficiencies raised in this case, and given priority to the persecution feared, as the Fourth Circuit hinted that they would have done had their hands not been bound by the *Lozada* requirements. Like, the one-year deadline the *Lozada* measures merely represent another procedural hurdle so blunt that it too undermines the RDP. With no reference to the INS gender-guidelines, it can be argued, that whether or not gender-guidelines are implemented, due to their soft-law character, jurisprudence and legislation will continue to take precedence and undermine their objectives. Thus, if the guidelines were made legally binding, the reasoning employed in *Mohammed* and other positive decisions arguably would take

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

priority over (or at least place them on an equal footing with) requirements, such as the BIA's *Lozada* requirements, used to deny protection in this case.²¹³

Before proceeding, it must be noted that another major limitation of the US RDP and its counterparts raised by *Barry* pertains to the assumption among decision-makers that claimants are aware of the procedural and appeals mechanisms available to them if they seek to present an ineffective assistance of counsel motion. Many claimants have fled their countries of origin to escape persecution. Many cannot speak the language of their chosen 'refuge' state, and many cannot read or write. Coupled with the fact that claimants find themselves in an unfamiliar environment, and have a genuine fear or mistrust of authorities, it is not surprising that claimants, such as *Barry*, therefore, either fail to initiate vital processes or make mistakes when they attempt to remedy a situation. In fact, recent findings emanating from the UK have revealed that many women found it difficult to obtain legal representation²¹⁴ and in the majority of cases claimants did not know who their case-worker was or how to contact them for assistance.²¹⁵ They also did not know what the case-worker was supposed to help them with. Claimants described feeling uniformed and confused about the RDP.²¹⁶ As exemplified in *Barry*, this lack of assistance and knowledge results in negative determinations rather than because their claim lacked merit.

The INS gender-guidelines emphasis the importance of creating a 'customer-friendly' asylum interview environment, so as to encourage claimants to freely discuss the elements and details of their claims.²¹⁷ They further call on asylum officers to remain aware of the fact that most claimants come from countries where they have good reason to distrust

²¹³ A number of Circuit Courts have recognized that, strict compliance with *Lozada* is not always required. See, *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 133 (3d Cir. 2001) ("There are inherent dangers, however, in applying a strict, formulaic interpretation of *Lozada*."); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir.2000) ("While the requirements of *Lozada* are generally reasonable, they need not be rigidly enforced where their purpose is fully served by other means."); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1272 n. 3 (11th Cir.2005) ("A petitioner claiming ineffective assistance of counsel in an immigration proceeding must demonstrate substantial compliance with the *Lozada* requirements...."). For a Further negative determination highlighting the liminations of the INS gender-guidelines, see, *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007).

²¹⁴ Muggeridge, *supra* note 130, at 41.

²¹⁵ *Ibid.*, at 35.

²¹⁶ *Ibid.*

²¹⁷ INS Gender Guidelines, *supra* note 192, at 4.

those in authority.²¹⁸ Perhaps, if binding gender-guidelines were used in *Barry*, the outcome would have been different: the court would have acknowledged that the linguistic and cultural barriers facing the claimant, in addition to her distrust of authorities where factors which prevented her from significantly complying with the *Lozada* requirements. Thus, her motion to re-open would have been successful and she would have been granted refugee status as stated by the court. The fact that these factors are not alluded to in the examined judgments is further evidence that the guidelines were not consulted. In fact, Asylum Aid has noted that some decision-makers have exhibited very poor knowledge of gender-related persecution, and that there was almost a lack of preparation by some, regarding objective COI. In fact, in one case, one woman described fearing that her daughter would be subjected to FGM if returned to the Sudan. The decision-maker replied: “can you clarify what you mean by circumcision? I have not heard of female circumcision”. This decision is surprising, because the UK gender-guidelines and asylum policy instructions both mentioned and described the practice of FGM.²¹⁹ Such knowledge is essential if women’s claims are to be decided appropriately.

Moreover, in addition to the above assumption that claimants are aware of these processes and remedial mechanisms, it should also be acknowledged that in some instances claimants will be not aware of such requirements unless informed by their legal counsel, and as *Barry* indicates, unless statutory requirements are followed their claims will fail regardless of whether they are genuine or not. Arguably, some representatives may not inform claimants of their ability to complain about the legal assistance which they have received, either because they feel that it is not necessary, or because they may not wish to be criticised for failing to adequately prepare the case, thus exposing their lack of knowledge in respect of the guidelines and gender-based claims in general. This issue needs to be addressed within the RDP and comprehensive reforms, including the use of experienced and specialised counsel, court aids and victim advocates, like those within the domestic violence courts, need to be implemented to effectively ensure that claimants may be assisted in obtaining and accessing essential resources, services and information as required. These reforms will help to deepen decision-makers and representatives

²¹⁸ *Ibid.*

²¹⁹ Muggeridge, *supra* note 130, at 39.

understanding of FGM and the types of persecution that women face and offers a useful model of altering institutional culture and approaches to decision-making.

In addition to the procedural barriers discussed above, claimants also have to endure as part of the RDP a credibility assessment. Negative credibility findings, as Section III will disclose are often the basis upon which asylum claims are refused. Investigations into the quality of asylum decision-making have shown that refusals based on lack of credibility were undertaken using unreasoned and unjustifiable assertions and were not supported by the analysis of the facts.²²⁰ The analysis of the examined FGM case-law has revealed that the credibility of claimants was at stake in most of the cases and may have influenced negatively the final decision. Before, exploring those findings, Section II will now examine some pertinent substantive legal issues emerging from the case-law and related research.

II. Substantive Legal Issues

Although all relevant legal concepts used in assessing refugee claims apply equally to men and women, some affect women more frequently because of the gendered nature of their claims. The need to show the absence of State protection is an element which is often found in gender-related cases. Most of these cases are based on a fear of persecution by non-state actors. To qualify as a refugee, a claimant must demonstrate that the state is either unwilling or unable to provide protection from that persecution. This is harder to do if the claimant fears persecution from a non-state actor. Moreover, due to the absence of gender as an enumerated persecution ground, it is common for women's claims to be considered in relation to the PSG category, which as discussed in Chapter Two, has been interpreted differently by the case-studies and even their respective courts in some instances.

However, to ensure an inclusive interpretation of the Refugee Convention, all enumerated persecution grounds should be considered from a gendered perspective. Finally, from a substantive view point where a claimant can demonstrate that she has a well-founded fear of persecution and is unable to avail herself of protection in her country

²²⁰ *Ibid*, at 18.

of origin, she may still be refused protection, if it is determined that she can relocate to another area of her home country. If an IFA is found to be reasonable, refugee status and other forms of protection will be denied. An IFA, as the case-law will now reveal, may affect women claiming refugee status more significantly because women seeking protection may fear persecution by non-state actors more often than men and the option of relocating is less likely when the persecution feared emanates from the State. These substantive issues have affected FGM claimants and resulted in wrongful denials. In this section I am now going to focus on the substantial legal issues of ‘Convention Grounds’ and the ‘IFA’ as these issues have been misconstrued by decision-makers in FGM, as will now be discussed.

A. Convention Grounds - PSG

Research has revealed that where the sole reason for persecution was gender-related, the Refugee Convention was never held to be engaged²²¹ and that some decision-makers showed a marked reluctance to engage with the PSG category. In fact, when a woman presented a claim which included gender-related persecution, a ground such as political opinion or race was more adequately explored, even when membership of PSG could have been engaged. This approach arguably, has created a higher threshold for women to meet. Thus, as the following case will reveal it appears that decision-makers are prepared to ignore gender-guidelines and are unwilling to consider engaging with the Refugee Convention where no directly applicable case-law is available and where case-law and COI did exist, they are prepared to take a very narrow view towards applying it.

In 2004, a claimant claimed to have a well-founded fear of persecution if returned to Sierra Leone on account of her membership in the PSG: a female who is expected to undergo FGM.²²² In dismissing both the asylum and Article 3 claims,²²³ the decision-maker conceded that there would not be a sufficiency of protection for the claimant were

²²¹ Muggeridge, *supra* note 130, at 45.

²²² *RM v Secretary of State for the Home Department*, UKIAT 00108 (2004), Para 2, available online at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKIAT/2004/00108.html&query=female+and+genital+and+mutilation&method=boolean> (last accessed 17/7/17).

²²³ *Ibid*, Para 3.

she to be removed to Sierra Leone and she was granted three years humanitarian protection leave.²²⁴ The decision was appealed to the IAT on the basis that the claimant's claim engages the Refugee Convention by way of her membership of a PSG. The claimant's account was that she comes from a lineage of women who generally hold the rank of persons responsible for the carrying out of FGM. Her grandmother, the head circumciser in her village died without a descendant save for her. The claimant said that she was selected by a group of females in her village to replace her. They were going to force her to undergo FGM which she objected to and she fled.²²⁵ It was argued that the PSG to which the claimant belonged was that of women of the Mendi tribe. Their immutable characteristics are that they are young and female, with an intact body, which has not been interfered with by way of FGM, regardless of the fact that some of the women from that tribe do not oppose FGM.²²⁶ The desire to preserve their body is so fundamental that they should not be required to change it. Reaffirming the reasoning of the adjudicator, the IAT, noted that because of the widespread practice of FGM at all levels of society, that the claimant could not establish membership of a PSG: "The appellant is a long way away from the situation of women in Pakistan who, in *Shah and Islam*, were found to be fundamentally discriminated against".²²⁷ Thus, the IAT reasoned that, being young and female would apply to all the young females in Sierra Leone and that this group did not exist independently of the fear. Her asylum claim was once again denied.

Arguably, had the UK gender-guidelines been applied the outcome in this case would have been different. According to the UK gender-guidelines a PSG will exist where "a group of individuals with a particular characteristic are recognised by society as being different from others in the society".²²⁸ According to the guidelines, whether that will be

²²⁴ *Ibid.*

²²⁵ *Ibid.*, para 5.

²²⁶ *Ibid.*, para 7.

²²⁷ *Ibid.*, para 9.

²²⁸ UK Gender Guidelines, *supra* note 192, section 3.35. See also, *Asylum Policy Instruction: Gender Issues in the Asylum Claim* *supra* note 63 at 9 (noting the Islam and Shan approach and encouraging decision-makers to follow this approach which has been identified by the European Council Directive (2004/83/EC) of 29th April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the content of the protection granted. This Directive has been transposed into UK law through the Refugee or Person in need of International Protection (Qualification) Regulations 2006 – "Qualification Regulations" – and

the situation will depend on the evidence and the factual situation in the particular country of origin.²²⁹ Thus, the society of a country of origin, the acts of persecutors as well as other external factors have a role in defining, identifying and even causing the creation of a PSG.²³⁰ The particular characteristics in this case which identify the claimant as belonging to a PSG include her status as a ‘potential head circumciser’ who opposes the practice of FGM and as an uninitiated and intact woman: in other words, her gender and her tribal/clan affiliation. Because the objective evidence indicated that FGM is widely practised among all levels of society, with prevalence rates as high as 80 to 90% and the fact that circumcisers are identifiable within society as they are specifically chosen among the tribes, the fact that the claimant is an un-initiated and intact potential circumciser, identifies her as belonging to a PSG which exists independently of her fear of FGM. If the guidelines had been properly interpreted in this manner the decision-maker would have identified the existence of this PSG and granted her refugee status. Instead of taking this ‘gendered’ initiative (which the HOL later did in *Fornah*), the decision-maker confined his examination to the proposed PSG of women of the Mendi tribe and in recognising that being young, and female would apply to all young female in Sierra Leone determined that this PSG did not exist independently of the harm feared. Moreover, had the UK gender-guidelines been used or properly interpreted the purported size of the potential PSG which was undoubtedly a deciding factor in this case should not have been used when determining whether a PSG existed.²³¹ As the UK gender-guidelines note, the fact that the PSG consists of large numbers of the female population in the country concerned is irrelevant - race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.²³² Arguably, due to the prevalence of FGM, the mere existence of young females who object to the custom and

changes to the immigration rules, and will apply to all asylum and human rights claims from 9 October 2006).

²²⁹ *Ibid* (“A definition of what constitutes a PSG is provided in the Qualification Regulations, which state that: “A group shall be considered to form a particular social group where, for example: (1) Members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and (2) That group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.” See also, UK Gender Guidelines, *supra* note 192, section 3.36.

²³⁰ *Ibid*, section 3.37.

²³¹ There is no mention or reference to the gender-guidelines in this case.

²³² UK Gender Guidelines, *supra* note 192, at Section 3.45.

whose bodies remain intact, reveals the existence of a PSG. Arguably, the IAT was afraid to make such a determination, on account of the political fear that thousands of Sierra Leonean women would claim refugee status on this basis in the UK.

The systematic failure observed in engaging with the Refugee Convention and in identifying the grounds of PSG (as evident from the examined FGM case) created a considerable gap in the adequacy of the assessment of the asylum claims of women where the claim is based on gender-related persecution including FGM. In such cases, not only do such claimants have to convince the decision-maker that their account is truthful; they also have to establish they form part of a PSG and that no state protection is available. Research produced by Asylum Aid has further revealed that, decision-makers are reluctant to engage with the PSG category and this in effect creates an extremely high threshold for women to cross to be recognised as a refugee.²³³ The UNHCR'S 2010 Quality Integration Project report on decisions made in the fast-track system similarly identified poor consideration of whether a claim engages a Convention ground and in the identification of the Convention ground of membership of a PSG, particularly in women's claims.²³⁴ Similar arguments could be made about the quality of decisions emanating from decisions emanating from the facts-track refugee system in the US and Canada. These findings suggest that decision-makers urgently require in-depth training on engaging with the Refugee Convention and their respective gender-guidelines, specifically in terms of the PSG ground for cases involving FGM. They also, in the opinion of this researcher need to update their knowledge of case-law relevant to such cases.

B. IFA

Research has revealed that the IFA matter is generally considered in a, "cursory manner, without any detailed engagement with the specific circumstances" of the claimant²³⁵ or the advice contained within the gender-guidelines.²³⁶ In the clear majority of cases, the underlying argument was that as the credibility of the claimant's claim was rejected, it

²³³ Muggeridge, *supra* note 130, at 51.

²³⁴ See, UNHCR, "*Quality Integration Project - First Report to the Minister*", August (2010) at 3, as cited in Muggeridge, *supra* note 130, at 51.

²³⁵ Muggeridge, *supra* note 130, at 64.

²³⁶ *Ibid*, at 25.

would be safe for her to return to her country of origin and that there was no need to substantially consider the issue of an IFA.²³⁷ For instance, in one documented gender-related case, the claimant stated during her asylum interview that due to her mixed ethnicity, the only place in the DRC where she could live would be Goma. The decision-maker concluded that “as aspects of your claim have been rejected, internal relocation is not considered necessary but if you wish to internally relocate, this is a viable option for you”. In fact, the claimant’s mixed ethnicity was never rejected and therefore an IFA should have been considered, regardless of any other findings made. In a subsequent appeal hearing, an immigration judge made a specific finding on the issue stating that, an IFA was not possible within the DRC and that it would be unduly harsh to expect the claimant and her infant son to relocate. It was also determined that her Rwandan/Congolese mixed ethnicity and her Tutsi background would make it impossible for her relocate safely.²³⁸ In another case, the IFA was considered in the alternative. In the case of a gay woman from Uganda it was suggested that, “even if it were accepted that you a lesbian, it is considered that you could relocate to another area of Uganda”. In the vast majority of cases it appeared that IFA was considered only to ‘cover all bases’ in the event of an appeal. Thus, in my opinion, because there is no mention of the IFA within the 1951 Refugee Convention, it could be argued that this is a ‘judicially created notion’ used to justify denials in complex cases. Furthermore, consideration of the IFA has been found not to take into consideration objective evidence or the concept, taken from case-law, of relocation being unduly harsh. This cursory approach is most evident in the following FGM claims.

In the first case, the claimant, a Nigerian national fled after her father tried to force her to undergo FGM. She had gone to the police but was refused help. The Home Office decision-maker accepted that she had refused the procedure and was now in fear of her father but stated that her claim was not one that engaged the Refugee Convention: “your claim is not based on a fear of prosecution in Nigeria because of race, religion, nationality, membership of a particular social group or political opinion. As such you do not qualify for asylum in the UK”. The Home Office also argued that she could have sought help

²³⁷ *Ibid.*

²³⁸ *Ibid.*

from an NGO which runs a shelter for women fleeing FGM, as well as pursuing protection from the police, and that an IFA was therefore available. These issues arose despite the gender-guidelines recognising FGM as a form of persecution. The guidelines also refer to the possibility of women who may be subjected to FGM being considered a PSG.²³⁹

Similarly, in *NK (Cameroon)*²⁴⁰ the claimant claimed that when she turned eighteen her step-father began to pressurize her to become a Muslim. A few years later he took steps to arrange a marriage for her and demanded that she undergo FGM. She went to the police, but they refused to pursue the matter and, indeed, following a complaint to them from her stepfather, arrested, detained and molested her. During the time, she spent in three separate prisons she was raped. Eventually in November 1998 she was finally released when her mother bribed the guards. With her mother's help, she then fled the country.²⁴¹ Whilst her claim was accepted as credible, it was dismissed by the decision-maker on the basis that, firstly he considered that her release on payment of a bribe demonstrated that the authorities no longer had an adverse interest in her. He reasoned that her stepfather, since she was now older would no longer have the desire to harm her: "It would not be in accordance with custom to force her to undergo FGM at her age". Secondly, he further reasoned that she would have a viable IFA, if she relocated to another area within Cameroon.²⁴² This aspect of the decision was later upheld by the IAT.

The assumptions in the case, that no future persecution existed and that an IFA was available based on the evidence presented (which will now be discussed in relation to the appeal before the IAT), indicates a complete disregard for the gender-guidelines and a lack of understanding by the decision-maker (in the initial determination) of gender-based violence and the situation and hardships faced by lone women who are forced to relocate within their countries of origin. Arguably, had the decision-maker been trained in the use and interpretation of the gender-guidelines, he would have addressed the case in a gender-sensitive manner and would have realised that the claimant would indeed face serious harm upon her return and that the hardships which she would endure from being forced

²³⁹ See, Ceneda & Palmer, *supra* note 23.

²⁴⁰ *NK (Cameroon) v SSHD*, [2004] UKIAT 00247, available online at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKIAT/2004/00247.html&query=female+and+genital+and+mutilation&method=boolean> (last accessed 17/7/17).

²⁴¹ *Ibid*, para 2.

²⁴² *Ibid*, para 3.

to relocate would be disproportionately harsh. According to the UK gender-guidelines, the question to be asked in deciding whether it is reasonable to expect a claimant to relocate is, “would it be unduly harsh for the asylum seeker to relocate within their country of origin?”²⁴³ Thus, in considering the reasonableness of relocation the decision-maker should have taken the claimants gender into account,²⁴⁴ as in the vast majority of FGM practicing societies women face financial, logistical, cultural, and social and other difficulties. Thus, the fact that FGM and discrimination against women was shown to be widespread in Cameroon, arguably placed the claimant in an unduly harsh position if forced to relocate. The documentary evidence in this case was arguably mistreated and misconstrued by the decision-maker in the first instance and the IAT at the appeal stage (as will now be discussed), so as to make the existence of an IFA appear more probable and to mask the evident lack of understanding of the complex gender issues presented before the decision-makers involved.

At her appeal before the IAT, it was contended that the decision-maker had been wrong to conclude that the claimant would not face serious harm on return to her home area and wrong to conclude she would in any event have a viable IFA.²⁴⁵ The IAT agreed that the decision-maker had erred in concluding that the claimant would not face further acts of serious harm:

irrespective of whether FGM was or was not practiced on older women, her stepfather had proved capable of influencing local police and security forces to imprison and maltreat her for nearly eleven months. His anger at her had not been solely because of her refusal to undergo FGM. It was also because she had refused to convert to Islam and refused to go through with the marriage he had arranged. Therefore, it was reasonably likely, in our view, that her act of fleeing after release from prison would have angered him further, in particular for having frustrated his plans for her marriage.²⁴⁶

In spite of this acceptance, the IAT did not consider that the decision-maker had been wrong to dismiss the appeal, again reasoning that an IFA was available to her.²⁴⁷ They

²⁴³ UK Gender Guidelines, *supra* note 192, at 2B.11-13. See also, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 63, at 6-7.

²⁴⁴ *Ibid.*

²⁴⁵ *NK (Cameroon) v SSHD*, *supra* note 240, para 4.

²⁴⁶ *Ibid.*, para 5.

²⁴⁷ *Ibid.*, para 6.

determined that while the decision-maker was wrong to find that the claimant's stepfather would no longer have any animus against her, he was entitled to find that he would not have the necessary resources to pursue her or locate her in other parts of Cameroon.²⁴⁸ It was stated that there was no tangible evidence to show that:

Individuals with influence locally are able to get the police and security forces elsewhere in the country to pursue or target individuals on their behalf, at least not when the matter concerned only family and domestic matters.²⁴⁹

In challenging the existence of an IFA, Counsel for the claimant provided ample evidence to highlight the widespread, systematic practice of FGM. It was alleged that the claimant risked being subjected again to pressure from local Muslims to convert or marry or undergo FGM.²⁵⁰ Due to the fact that the claimant identified her own religious persuasion as Catholic, the IAT reasoned that she could therefore easily relocate within a Christian area.²⁵¹ Referring specifically to IRB Canadian materials and the CIPU Report of a Fact-finding Mission to Cameroon in January 2004, Counsel submitted that, FGM was a widespread and routine practice in Cameroon (throughout both Muslim and Christian areas);²⁵² and that it was not only practiced on young girls but also on women prior to marriage, regardless of her age”.²⁵³ In its determination, the IAT concluded that while FGM is practiced on a significant percentage of the female population, it is only on the highest figures presented in the CIPU report inflicted on only one in five.²⁵⁴ Moreover, while the IAT conceded that the government of Cameroon had not passed laws to make FGM illegal or to repudiate the custom, it narrowly construed the CIPU Report at paragraph 6.70 which stated that the practice of FGM, “is normally practiced on young girls aged 6-8 years”,²⁵⁵ suggesting that the claimant was no longer at risk. Thus, it

²⁴⁸ *Ibid*, para 7.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid*.

²⁵¹ *Ibid*.

²⁵² *Ibid*, paras 9-10.

²⁵³ *Ibid*, para 8.

²⁵⁴ *Ibid*, para 9.

²⁵⁵ *Ibid*, para 10.

concluded that, there was no suggestion in the report to suggest that the practice of FGM is inflicted as often on post-adolescent as on pre-adolescent females.²⁵⁶

Counsel for the claimant further submitted that, if the IAT found that the claimant would not be at risk of being pursued or located by her stepfather or members of his family, that they should find that it would be unduly harsh to expect a young woman on her own to relocate within Cameroon. In this regard, counsel for the claimant, drew the attention of the IAT to a number of passages in the background materials highlighting discrimination against women in a number of areas in Cameroon. The poor record of the authorities was also highlighted.²⁵⁷ The IAT determined, however, that this evidence fell short of establishing a consistent pattern of gross, mass or flagrant violations of the human rights of women.²⁵⁸ Furthermore, whilst the IAT determined that the claimant might face hardship in other parts of Cameroon outside her home, it did not consider that the evidence justified a conclusion that the claimant would face a real risk of serious harm. The appeal was dismissed, and asylum denied.²⁵⁹

This case, like others²⁶⁰ highlights not only the ineffectiveness of the UK gender-guidelines, but also the lack of gender and cultural sensitivity among decision-makers at all levels. For instance, the fact that an IFA was deemed to exist in light of the widespread practice of FGM, discrimination against women (including human rights abuses) and the failure of the State to prohibit the practice highlight a lack of understanding of gender issues in the Refugee Convention, and a complete lack of regard for supporting documentary evidence, in respects of women's experiences/status within their respective countries of origin. Arguably, had the guidelines been applied and interpreted in a gender-sensitive manner, it would have also been apparent to the IAT that relocation would have been unduly harsh for the claimant. Faced with documented widespread discrimination against women, the fear of FGM and the possible inability to find work or marry as the

²⁵⁶ *Ibid*, para 11.

²⁵⁷ *Ibid*, para 12.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid*, para 13.

²⁶⁰ See, *Secretary of State for the Home Department (SSHD) v Julia Wanguru Muchomba*, Appeal No. CC-25710-2001, 2 May 2002, [2002] UK IAT 01348; *Secretary of State for the Home Department v. Njeri*, IAT 7 Apr. 2003, [2002] UK IAT 08114; *Secretary of State for the Home Department v. Adhiambo*, IAT 7 Aug. 2002, [2002] UK IAT 03536; *CM (Kenya) v. Secretary of State for the Home Department: Case No: C5/2006/1206*, EWCA Civ 312, (2007).

claimant was uncut and potentially unmarriageable; arguably the claimant would be unable to survive alone in any part of Cameroon. Yet, the IAT reasoned that these factors were not serious enough to reach the standard of being ‘unduly harsh’.

Moreover, according to the UK gender-guidelines failure of State protection may occur as a result of the following: legal provisions or the absence of such provisions; lack of access to justice and police protection; lack of police response to requests for assistance, or a reluctance, refusal, or a failure to investigate, prosecute or punish individuals; and encouragement or toleration of particular social, religious or customary laws, practices, and behavioral norms, or an unwillingness or inability to take action against them.²⁶¹ As discussed in Chapter Two, women may also be subject to gender-related abuse resulting from social customs or conventions because there is no effective means of legal recourse to prevent, investigate or punish such acts.²⁶² Such failure of State protection may include, but is not limited to, legislation (e.g. marital rape exemptions in law), lack of police response to pleas for assistance and/or a reluctance, refusal or failure to investigate, prosecute or punish individuals and encouragement or toleration of particular social/religious/customary laws, practices and behavioral norms or an unwillingness or inability to take action against them.²⁶³ The IAT as previously discussed, determined that a pattern of gross, mass or flagrant violations of the human rights of women was not apparent in this case. However, if this provision of the guidelines had been applied to the evidence presented, a lack of state protection would arguably have been found, thus rendering the existence of an IFA improbable. The widespread practice of FGM coupled with a lack of legal provisions prohibiting the practice indicates that meaningful national protection is not available in Cameroon. Secondly, documentary evidence highlighting discrimination against women, coupled with the testimony of the claimant that she was unable to obtain police protection on account of their unwillingness to protect her and the harm which she suffered whilst in prison, arguably signifies a toleration of particular social, religious or customary laws, practices, and behavioral norm, or an unwillingness or inability to take action against them.

²⁶¹ UK Gender Guidelines, *supra* note 192, Section 2B.8 & 2B.9.

²⁶² *Ibid*, Section 2B.9. *See also*, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 63, at 5-6.

²⁶³ *Ibid*, at 6; *See also*, UK Gender Guidelines, *supra* note 192, Section 2B.9.

The UK gender-guidelines in applying the standard of protection to be offered states that it is “not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state”.²⁶⁴ As part of the State’s duty to protect, the guidelines further argue that the duty to protect also includes the duty to protect women’s human rights. FGM and other forms of discrimination against women are recognized human rights violations. Cameroon is a signatory to a plethora of international human rights conventions or covenants and their additional protocols, including CEDAW, CRC and the Torture Convention to name but a few.²⁶⁵ Arguably, the obligations to protect women arising from these instruments, at the time that this case was determined were not being complied with and thus again signifies a lack of State protection which would have meant that no viable IFA adequately existed. Arguably, had the gender-guidelines been applied, value been given to the documentary COI presented, and the standard of State protection correctly applied an IFA would not have been deemed to exist and coupled with the admission of the IAT that the claimant had a well-founded fear of future harm the claimant would have been granted asylum.

Moreover, the fact that FGM, forced marriage and forcible religious conversion were referred to as ‘domestic’ and ‘family’ matters further reinforces the notion that without proper gender-sensitive training, decision-makers will remain oblivious to the complexities facing women in their respective countries of origin and in tandem, permit the influence of cultural relativism and gender-biases within the decision-making process. A gender-sensitive interpretation and application of the UK gender-guidelines would have been beneficial in this case. If decision-makers were bound to apply the guidelines, the narrow interpretation given in this case, in respects of deliberately citing paragraphs within the evidence which justified their reasoning by establishing the theoretical existence of an IFA, could be questioned. Thus, these decisions need to be subjected to review, especially in appeal cases. This case, and the research emanating from the UK reveals the gender-

²⁶⁴ UK Gender Guidelines, *supra* note 192, Section 2B.2 (quoting *Horvath v. Secretary of State for the Home Department*, UKHL, [2001] 1 AC 489).

²⁶⁵ See, UN Human Rights Instruments, “Core document forming part of the reports of States Parties: Cameroon. 19/06/2000”, HRI/CORE/1/Add.109, (2000), available online at <http://www.unhchr.ch/tbs/doc.nsf/0/33bb745d595710e3c125693d0035f74b?Opendocument> (last accessed 17/7/17).

guidelines were either not applied or applied incorrectly, and that the IFA was considered in a cursory manner with inadequate consideration being given to women's specific circumstances, to access and effectiveness of state protection and to COI about the situation for women. Additionally, as highlighted in the *NK Cameroon* case, there was evidence that the 'undue harshness' test was not being appropriately applied, and COI was being misconstrued and selectively used to justify the existence of an IFA and to deny protection.

C. Evidential Issues

As is evident from the previous section the choice of COI was used selectively to justify the final determination. Evidence suggests that there is a significant failure to identify and consider information that is relevant and appropriate, especially in gender-related claims, and the choice of information used in refusals was also selective.²⁶⁶ In fact, some cases reveal that sections that undermined the claimant's case were quoted and highlighted, while sections (often from the same report) that corroborated the claimant's cases were ignored.²⁶⁷

It is vitally important for decision-makers to have before them balanced and representative COI from a range of credible sources when considering claims. Research has identified a gap in the availability of COI relevant to some aspects of gender-related persecution and the range of human rights violations that women may be subjected to in their country of origin.²⁶⁸ Even when such information is available, it is often ignored or selectively used. For instance, in the case of the female claimant from the DRC, the fact that she was of mixed Congolese and Rwandan nationality and was therefore perceived as Tutsi was a key aspect of her claim. The COIS Report for the DEC which was quoted extensively in her refusal letter as a basis to justify the adverse credibility finding, contained specific and detailed references to the risk faced by those perceived as Tutsis. Some of the information corroborated the claimants claim. The relevant OGN on DRC

²⁶⁶ Muggeridge, *supra* note 130, at 59.

²⁶⁷ *Ibid.*

²⁶⁸ Collier B, "Country of Origin Information and Women: Researching Gender and Persecution in the Context of Asylum and Human Rights Claims", Asylum Aid: London, (2007), at 6-7.

also contained specific reference to the risks faced by Tutsis. None of this information was referred to in the refusal letter.²⁶⁹

Access to and appropriate use of COI is essential in assessing the effectiveness of state protection. This is particularly the case in FGM determinations which often involve persecution in the private sphere, both in determining whether state protection was accessible to and effective for a woman before she fled her country and to determine whether it would be accessible to and effective for her if she returned, either to her home area or to another area of her country. Failure to source relevant, reliable and balanced country information, or the use of such information in a selective manner and unrepresentative way, as was the case in *NK Cameroon*, can have a detrimental effect on the outcome of a claimant's claim for asylum. Information about gender-related persecution, access to effective state protection and the treatment and conditions of women in home countries may be harder to access. This as the following section will highlight can result in unfair credibility determinations.

Having examined the failure of the RDPs of the case-study countries to give effect to the gender-guidelines and the failures of decision-makers to effectively apply and interpret the gender-guidelines, the following section will now examine the issue of credibility. The description of credibility is necessarily lengthy, as it firstly, highlights the extent to which the RDP and gender-guidelines in respect of credibility assessments can be undermined, and secondly, reinforces my contention that in a similar manner to the historical treatment of domestic violence, decision-makers within the RDP are masking their biases, lack of understanding, and permitting governmental considerations thorough the use of credibility to triumph over their international obligations under a veneer of legitimacy and respectability.

III. Credibility, FGM and Refugee Status Determination

²⁶⁹ Muggeridge, *supra* note 130, at 61.

Despite a greater focus on the influence of gender in refugee status determination women face with the RDP, women, as discussed, still face greater obstacles to the grant of refugee status than their male counterparts. Specifically, women confront numerous hurdles in establishing their credibility.²⁷⁰ At the core of refugee law is the humanitarian belief that the international community must offer protection to victims of human rights violations, regardless of their gender or nationality.²⁷¹ Viewed in this light, “it is clear that credibility assessment must err on the side of protection, refrain from discrimination and maintain as a priority the well-being of the applicant”.²⁷² Nevertheless, credibility-based decisions within the RDP are habitually based on personal judgment that are, inconsistent from one adjudicator to another, un-reviewable on appeal, and increasingly influenced by cultural misunderstandings.²⁷³ The reality, is that many claimants have great difficulty in convincing decision-makers of the ‘truth’ of their claims. Considering this reality, attempts have been made to give credibility assessments a more tangible basis.

Whilst each of the gender-guidelines implemented by the case-studies, address the issue of credibility²⁷⁴ their limited guidance is evidenced by the fact that, respective administrative agencies have in recent years articulated specific factors that decision-makers should consider when deciding whether to accept a refugee claimant’s credibility.²⁷⁵ Like the gender-guidelines these credibility assessment guidelines are deficient; whilst they identify factors that should be taken into consideration by decisions-makers, such as demeanor, cultural differences, trauma, and evidence pertaining to COI

²⁷⁰ Drudy A, “Credibility Assessments and Victims of Female Genital Mutilation: A Re-Evaluation of the Refugee Determination Process”, 14 Irish Student Law Review 84, (2006), at 84.

²⁷¹ Office of the United Nations High Commissioner for Refugees, “Guidelines on the Protection of Refugee Women”, U.N. Doc. ES/SCP/67 (1991), para 1. (Hereafter referred to as Guidelines on the Protection of Refugee Women). These guidelines are available online via the UNHCR: The UN Refugee Agency website at <http://www.unhcr.org/3d4f915e4.html> (last accessed 1/7/17).

²⁷² Drudy, *supra* note 270, at 84.

²⁷³ Kagan M, “Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination”, 17 Georgetown Immigration Law Journal 367, (2003), at 367.

²⁷⁴ See, UK Gender Guidelines, *supra* note 192, Sections 5.40-5.47; Asylum Policy Instruction: Gender Issues in the Asylum Claim, *supra* note 63, at 12-13; INS Gender Guidelines, *supra* note 192, at 67; CIRB Gender-Guidelines, *supra* note 192, at C: Evidentiary Matters & D: Special Problems at Determination Hearings.

²⁷⁵ See, US Department of Justice, Immigration and Naturalization Service, *The Basic Law Manual*, 102 (1994); Immigration and Refugee Board, *Assessment of Credibility in Claims for Refugee Protection*, (2004), available online at <http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/rpdspr/cred/Pages/index.aspx> (last accessed 20/6/09). See also, “Asylum Instructions on Assessing Credibility in Asylum and Human Rights Claims” (2008). (Hereafter referred to as UK Instructions on Assessing Credibility).

for example, they provide little guidance as to how these factors should be weighed against each other to reach a final decision.²⁷⁶ Importantly, like their gender counterparts, such administrative guidelines do not bind the relevant decision-maker, such that failure to consider credibility guidelines as they currently exist (indeed even acting clearly contrary to them) is not in itself a ground for judicial review.²⁷⁷

Assessments of credibility look for the situational and personal facts, from the point of view of the decision-maker, which may ultimately influence assumptions on the believability of an individual.²⁷⁸ Recent studies, have exposed several recurrent elements in the determination process and the problems associated with them in practice. Specifically, Kagan has identified the leading positive and negative factors which are given probative weight in this assessment.²⁷⁹ The positive credibility factors include firstly, detail and specificity; secondly, consistency; thirdly, proving all facts early;²⁸⁰ and finally, plausibility of the testimony. Negative credibility factors include, vagueness, contradictions, delayed revelation of key facts; and implausibility.²⁸¹ Additionally, corroborative evidence may have a positive bearing on credibility and the general demeanour of the claimant may have a significant impact on the evaluation. Because the reality that each decision-maker comes to a claimant's case with different backgrounds and biases, each will either consciously or unconsciously permit their biases and backgrounds to influence their determinations when addressing the above-mentioned factors.²⁸² Coupled with the relatively informal RDP's in operation throughout the case-

²⁷⁶ Kagan, *supra* note 273, at 374.

²⁷⁷ Millbank J, "The Right of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations", 21 International Journal of Refugee Law 1, (2009), at 27.

²⁷⁸ Zahle H, "Competing Patterns for Evidentiary Assessments", in Noll G, "Proof, Evidentiary Assessment and Credibility in Asylum Procedures", Martinuss Nijhoff Publishers: Boston, (2005), at 15.

²⁷⁹ Kagan, *supra* note 273, at 384.

²⁸⁰ Delay in making a claim or in providing information relevant to the claim made, can cast doubts on the claimant's credibility. For further discussion on this issue see, Herlihy J *et al*, "Discrepancies in autobiographical memories- implications for the assessment of asylum seekers: repeated interviews study" 324 British Medical Journal (2002), at 327 and Drudy, *supra* note 270, at 93.

²⁸¹ Minor inconsistencies or incorrect statement have often been decisive in rejecting refugee claims. For further in-depth discussion of these issues see, Drudy, *supra* note 270, at 92. See also, Coffey G, "The Credibility of Credibility Evidence at the Refugee Review Tribunal", 15 International Journal of Refugee Law 377, (2003), at 388. See also, Doornbos N, "On Being Heard in Asylum Claims – Evidentiary Assessment through Asylum Interviews", in Noll G, "Proof, Evidentiary Assessment and Credibility in Asylum Procedures", Martinuss Nijhoff Publishers: Boston, (2005).

²⁸² See, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, 1979. (Hereafter UNHCR Handbook), para 202; Rousseau C *et al*, *supra* note 1.

study countries, the problem with disparities in decisions, particularly credibility decisions are that they are unregulated.²⁸³ It is difficult to regulate a decision-makers decision when it is based on the intangibles of a case, such as a claimant's demeanour.²⁸⁴ FGM are a uniquely vulnerable group, susceptible to bias, misinterpretation, and inequitable decisions.²⁸⁵ Credibility assessments based on demeanour, plausibility, consistency and prompt provision of information may be fundamentally unsound, and psychological difficulties resulting from traumatic experiences²⁸⁶ may affect the ability of a claimant to provide any form of coherent testimony. It is proposed in this section to examine these factors in respects of the available FGM jurisprudence.

A. Delay and Fabrications

FGM claimants face the same general problems in credibility assessments as other refugees. However, in many cases their problems are augmented by several factors. Firstly, the assertions cast on credibility by delay in making a claim are particularly problematic for female claimants. Such delays are considered fabrications, merely to ensure success in otherwise futile claims. In the US case of *Oforji v Ashcroft*,²⁸⁷ the Seventh Circuit considered the application of a Nigerian woman who feared that her two citizen daughters would be subjected to FGM if she was forced to return to Nigeria with them. Oforji sought entry into the US in April 1996. The INS denied Oforji entry, detained her, and charged her with being an alien seeking to procure entry by fraud or wilful

²⁸³Ruppel J, "The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applications", 23 Columbia Human Rights Law Review 1, (1992), at 11.

²⁸⁴Coffey, *supra* note 281, at 386-8; Timony J, "Demeanor Credibility" 49 Catholic University Law Review 903, (2000); Goodwin-Gill G, "The Refugee in International Law" (2nd Ed), Oxford: Oxford University Press, (1996), at 350; Cohen J, "Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers", 13 International Journal of Refugee Law 293, (2001), at 308; Vrij A, "Detecting the Liars" 14 The Psychologist 596, (2001); Frank M, "Assessing Deception: Implication for the Courtroom", 2 Judicial Review 315, (1996); Vrij, A., Evans, H., Akehurst, L and Mann, S, "Rapid judgements in assessing verbal and nonverbal Cues: Their potential for deception researchers and lie detection" 18 Applied Cognitive Psychology 283, (2004).

²⁸⁵Buckhardt S, "The Contours of Conformity: Behavioural Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures", 19 Georgetown Immigration Law Review 35, (2004), at 41.

²⁸⁶See, Silove, Steel & Watters, "Policies of Deterrence and the Mental Health of Asylum Seekers", 284 Journal of the American Medical Association 604, (2000); Drudy, *supra* note 270, at 448-9; Pelosi L, Slade T, Blumhardt LD & Sharma VK, "Working Memory Dysfunction in Major Depression; an Event-Related Potential Study", 111 Clinical Neurophysiology 1531, (2000).

²⁸⁷*Oforji v Ashcroft*, 354 F3d 609 (7th Cir. 2003).

misrepresentation, as well as an alien not in possession of a valid immigration document. An initial hearing before an Immigration Judge was held on August 28, 1997, wherein Oforji admitted that she was an alien not in possession of a valid immigration document at the time of her entry but denied the fraud and willful misrepresentation charges. She also requested asylum, withholding of deportation, and protection under the Torture Convention.²⁸⁸ At the hearing, Oforji testified that she was a member of the Ogoni Tribe of Nigeria and that the tribe lived without roads, schools, and potable water. She further stated that due to these poor living conditions, the Ogoni Tribe formed the “Movement for the Survival of the Ogoni People” to petition the Nigerian regime of General Sani Abacha for these services. She also claimed that the Abacha regime tortured and arrested, as well as killed members of the Movement, and that she participated in demonstrations against the Abacha administration. She testified that in 1995, the Abacha administration arrested her husband, at their house for his participation in the Movement.²⁸⁹ She claims to have fled Nigeria to avoid arrest because she was too “outspoken.” However, on cross-examination she admitted that she fled because “the back of the house, was falling anyway”.²⁹⁰ Additionally, at the hearing Oforji acknowledged that Abacha has died since she fled but stated in a conclusory fashion that the government was nevertheless going to persecute her because of “oil.” In addition, she claimed without corroboration that the Nigerian government would persecute her because she left the country without a visa and because she was a runaway Ogoni. Finally, Oforji also testified that she had undergone FGM as a child and the Ogoni people (to which she belonged) required this of all women, with refusal punishable by death. She also testified that she did not have anyone with whom to leave her children in the event that she was deported. She admitted on cross-examination that she did not mention the fear that her then un-born daughters would undergo FGM when asked by the immigration inspector about her original asylum claim.²⁹¹

After, hearing this testimony, the Immigration Judge held that the evidence did not establish that she sought to procure entry by fraud or willful misrepresentation, but found

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

that she was inadmissible on the separate ground of lacking a valid entry document. The Immigration Judge then denied Oforji's request for asylum based on an adverse credibility finding regarding her testimony, and due to the fact that she had already suffered FGM. Oforji filed a timely notice of appeal with the BIA, who affirmed the opinion of the Immigration Judge.²⁹²

In addressing the adverse credibility finding, the Seventh Circuit, noted the inconsistencies in Oforji's testimony and stated that they 'bear a legitimate nexus'²⁹³ to the denial of her claim. As an initial matter, Oforji did not dispute the Immigration Judge's finding that she presented no evidence such as membership of the Movement for the Survival of the Ogoni People. Relying upon *Abdulrahman v Ashcroft*,²⁹⁴ which upheld an adverse credibility finding based in part on an alien's failure to substantiate his generalized testimony by providing documentation of his membership or involvement in a politically active student union, the court used this authority to undermine her credibility. Furthermore, at the hearing, Oforji conceded that she told the immigration inspector on the date of her arrival that she was seeking political asylum solely for economic reasons and that she had not been persecuted in Nigeria. This is inconsistent with her testimony at the hearing that she fled because of her political activity and because the Abacha administration had arrested and killed her husband. To this date, Oforji has failed to explain why she told the immigration inspector that she had never been persecuted in Nigeria.

Furthermore, at the hearing, Oforji testified that she fled because the government had planned to arrest her because she was too "outspoken," but she offered no support for this statement. On cross-examination, consistent with her response to the immigration inspector at the time of her entry, she admitted that she fled the same night of her husband's arrest because the back of her house was falling away. Further, Oforji claimed that the Ogoni Tribe lived in "River State," and suffered from poor roads, schools, and water. However, Oforji acknowledged that her sister also lived in River State, but did not suffer from a lack of water, nor did she have problems with the Abacha administration.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Abdulrahman v Ashcroft*, 330 F.3d 587 (3rd Cir. 2003), at 598-9.

Similarly, Oforji also claimed that the Abacha government was persecuting her because of “oil” but failed to offer any facts supporting this conclusion, other than her assertion that she “knew it to be true.” Importantly, despite claiming that she fled because of persecution from the Abacha administration, she conceded that Abacha was no longer in power in Nigeria due to his death.²⁹⁵

The Court further decided that, in an attempt to bolster her claim, the addition of new factual assertions, including the FGM claim which was not originally set forth can be viewed as, “inconsistencies providing substantial evidence that the applicant is not a reliable and truthful witness”.²⁹⁶ Whilst, Oforji claimed that her statements were made under great stress and without the benefit of counsel, the court determined that this admission, “not only implies an acknowledgment that her statements were not accurate, but also incorporates protections not required in immigration inspection questioning”.²⁹⁷

The adverse credibility finding in this case is unsound and highlights the extent to which the INS gender-guidelines are not being used and the extent to which the RDP is flawed. Firstly, in respect of Oforji’s inability to produce corroborating evidence of her membership in the ‘Movement for the Survival of the Ogoni People’, the Court should have been more sensitive to the fact that some claimants flee in such a hurry that it is impossible for them to provide corroborating evidence. Furthermore, Oforji testified that the Ogoni people lived without basic facilities, therefore it is highly probable that she was never issued with a membership card. Secondly, according to the gender-guidelines the demeanor of traumatized claimants can vary. Trauma may cause memory loss or distortion.²⁹⁸ Oforji initially fled Nigeria because of her fear of the Government and the possibility of arrest. The judgment fails to make any provision for the fact that some of her inconsistencies may have been because of the trauma which she had endured, including the arrest of the husband, the persecution of members of her Movement, and her fear of arrest and subsequent persecution. Similarly, the judgment makes no reference to the UNHCR Handbook, which notes that some claimants will delay providing

²⁹⁵ *Oforji v Ashcroft*, *supra* note 287.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ INS Gender Guidelines, *supra* note 192, at 7.

information due to a mistrust of authorities²⁹⁹ or the phenomenon of ‘reminiscence’. Arguably, had the guidelines been implemented and decision-makers adequately trained in credibility assessment, then some of these inconsistencies would have been understood and accounted for. Arguably, an experienced and trained representative should have also submitted evidence of such trauma.

In respect of the FGM claim, it was submitted that this additional information was an attempt to bolster Oforji’s asylum claim, and as such was evidence that she was unreliable and untrustworthy. Again, this determination is flawed. A well-founded fear on behalf of the child or because of the parents own opposition to FGM can arise upon the birth of a daughter post-flight. According to the FGM Guidance Note, the fact that a claimant did not demonstrate this conviction or opinion in the country of origin, nor act upon it, does not itself mean that a fear of persecution is unfounded, as the issue would not have arisen until then. The birth of a daughter, as in the Oforji case, in these circumstances, gives rise to a *sur place* claim.³⁰⁰ Furthermore, the Note posits that in the event that the claim is found to be self-serving, but the claimant nonetheless has a well-founded fear of persecution, international protection is required.³⁰¹ Consequently, if Oforji was indeed fabricating her claim so as to allow her to remain in the US, the fact that her daughters would be subjected to FGM, nevertheless, warrants her entitlement to international protection. However, instead of adopting such an approach, the Seventh Circuit preferred instead to characterize her claim as ‘derivative’. In its determination, the court correctly recognized that persecution is the, “infliction of substantial harm or suffering”, but it improperly rejected the possibility that Oforji could have an independent claim for refugee status.

In large part, the failure of Oforji’s application also falls on the shoulders of her representatives, who grounded her application on the theories of ‘derivative asylum’ and ‘constructive deportation’ instead of her independent status as a refugee.³⁰² Nonetheless, the Seventh Circuit erred in deviating from a proper analysis of persecution by labelling the separation of a child from its mother as ‘mere hardship’ and the abandonment of

²⁹⁹ UNHCR Handbook, *supra* note 282, para 198.

³⁰⁰ FGM Guidance Note, *supra* note 9, at 8. *See also*, UNHCR Handbook, *supra* note 282, paras 94-6.

³⁰¹ FGM Guidance Note, *supra* note 9, at 8.

³⁰² Conroy, *supra* note 96, at 128.

Oforji's children as an 'unpleasant dilemma'. In considering only the potential for derivative asylum or relief based on constructive deportation, the court "flagrantly ignored the individual persecution that Oforji claimed she would suffer and declined to remand the matter for the Board's consideration of these claims".³⁰³ Judge Posner problematically claimed in his concurrence that, "our hands are tied",³⁰⁴ thus neglecting to realize that nothing in the refugee definition bound the court in the way he described. Oforji exemplifies how the failure to implement the gender-guidelines, poor advocacy, and judicial short-sightedness, can result in the denial of protection to FGM claimants who delay in providing information, on account of the poor articulation of their claims.

In keeping with the theme of fraudulent activity and credibility, the Seventh Circuit applied the logic of *Oforji* in *Olowo v Ashcroft*³⁰⁵ where a mother applied for asylum based on her fear that a return to Nigeria with the two US citizen daughters would result in them being subjected to FGM.³⁰⁶ The Immigration Judge, BIA and Circuit Court denied Olowo's claim for asylum on the basis that she herself did not fear future FGM.³⁰⁷ The Circuit court summarily overlooked the possibility that Olowo would be subject to personal persecution in the form of extreme psychological harm and automatically assumed that hers was a 'derivate asylum' claim based on 'constructive deportation'.³⁰⁸ The court focused only on the potential harms to the children, completely disregarding any independent claims by the mother. Arguably, one of the deciding factors in this case was the diminished credibility of Olowo. In 2002, Ester who was a permanent US resident agreed to go to the Bahamas to help her friend illegally bring his daughter into the US. Thus, on account of this fraudulent act, Olowo was in bad standing with the court who determined that, "Mrs Olowo's testimony was not credible because it was inconsistent, self-serving, vague, and implausible" and that she tried to misinform the court with her untruthful testimony.³⁰⁹ The court, thus determined that Olowo had been an integral part of the scheme rather than an, "ignorant helper".³¹⁰ In light of this act, arguably the Court

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Olowo v Ashcroft*, 368 F.3d 692 (7th Cir. 2004).

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*, at 698.

³⁰⁸ *Ibid.*, at 701.

³⁰⁹ *Ibid.*, at 697.

³¹⁰ *Ibid.*

refused to believe that she had a well-founded fear of persecution in the form of FGM. This is supported in the first instance by the fact that the INS gender-guidelines are not referred to in the judgment; nor did the court elaborate on the PSG which the claimant claimed she and her daughters belonged to. In fact, the Immigration Judge commented that Olowo could not “bootstrap a claim for asylum based upon fear of harm to her children”.³¹¹ Arguably, whilst Olowo’s claim may have been to a degree self-serving, she nonetheless had a well-founded fear of persecution in the form of her daughters undergoing FGM, and as such should have been entitled to protection.

Arguably, if the guidelines were binding and decision-makers were legally obliged to state why they did not refer to the guidelines or elaborate on gender-specific areas of concern, the real reasoning behind this decision would have been revealed. Thus, the fear arising from FGM, which the court referred to as “a horrifically brutal procedure” with life-long consequences, and the persecution Ms Olowo would suffer on account of her daughter’s subjection to the practice was not arguably the real issue of concern in this case.

In an era of strict immigration policies and the desire to choose who can and who cannot enter their borders, the court influenced by the fall-out of 9/11 and their own personal choices to focus on the fraudulent act which she had committed and used that act to undermine her FGM claim. In other words, by construing her claim as ‘derivate’, the court sought to ensure that her claim would fail. As stipulated within the INA, an individual granted asylum can confer derivative status on a spouse or child,³¹² but the statute does not provide for a child to confer derivative status on a parent. According to Frydman and Seelinger this categorization is based, “on an erroneous conception that the parent does not suffer harm that is personal to herself, but rather, tries to derive relief through her daughter’s claim”.³¹³ A more precise analysis focuses on the parent’s own experience of opposing FGM while facing the prospects of either being unable to prevent its infliction – causing the parent grave distress, or being shunned by society for his/her

³¹¹ Rice, *supra* note 76, at 5.

³¹² Under INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A): “a spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.”

³¹³ Frydman & Seelinger, *supra* note 97, at 1090.

attempts to do so.³¹⁴ Both consequences may rise to the level of persecution, thereby entitling a parent to asylum in his or her own right.³¹⁵ This reasoning has been adopted in the FGM Guidance Note,³¹⁶ and should equally be implemented at the domestic level, thus bringing existing guidelines into line with international principles.³¹⁷ However, in this case the court refused to expand their analysis, instead using credibility and domestic legislative provisions to deny protection.

Furthermore, in making its final determination, the *Olowo* court, further assumed that if the whole family were to relocate to Nigeria, Mr Olowo would be able to protect his daughters from FGM, by rejecting the custom, and in doing so would shield his wife from having to watch her daughters undergo the practice.³¹⁸ The court based this determination on a dated State Department report that discussed the father's traditional role in the practice of FGM in Nigeria: "Under Nigerian Tradition, the father has control over the children. If the father opposes FGM, therefore, the children would almost certainly be safe".³¹⁹ It is, an over simplification of the court to declare Mr Olowo the ultimate decision-maker and protectors of his daughters from FGM.³²⁰ The court neglected to consider important cultural factors in its analysis and by applying the cultural norms of the US, rather than those of Nigeria, "it failed to comprehend the fear of Mrs Olowo and her daughters".³²¹ Thus, by failing to take into account the cultural norms underpinning FGM within Nigerian societies, not only does this case illustrate the extent to which COI is overlooked, it highlights a complete lack of regard for the INS gender-guidelines, and reinforces how its non-binding nature permits the influence of credibility, biases and political considerations (namely the desire to reduce immigrants) among decision-makers to prevail. As will be discussed in due course, detailed and contemporary COI is vital in

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ FGM Guidance Note, *supra* note 9, at 8.

³¹⁷ This implementation as will be further discussed in Chapter Five, may take the form of either a general provision within the existing guidelines or be implemented within a specific guidance note in relation to a specific form of gender-based persecution, including FGM.

³¹⁸ *Olowo*, *supra* note 305, at 698.

³¹⁹ *Ibid.*

³²⁰ Aherne M, "*Olowo v Ashcroft: Granting Parental Asylum Based on a Child's Refugee Status*", 18 Pace International Law Review 317, (2006), at 335.

³²¹ *Ibid.*

determining gender-related refugee claims and when properly consulted, can aid decision-makers in understating the experience and status of women in countries of origin.

In Nigeria, societal notions of virginity are promoted.³²² Thus, considerations of a native country's traditions and cultures should be an important factor in helping the court to determine the claimant's credibility, as provided for under the INS gender guidelines.³²³ The *Olowo* court, recognized the concept of 'extreme hardship' on the children, however, it refused to expand that notion of compassion to the present facts, when one parent was able to remain in the US with the children.³²⁴ What is considered an absurd act by parents in the US is respected in other countries. Thus, "parents who resist FGM also frequently face ostracism and can be subjected to bodily harm for their opposition".³²⁵ Therefore, even though Mr Olowo may have been personally opposed to the practice, societal influences and the threat of retaliation once in Nigeria, may result in him relenting and subjecting his daughters to FGM.

Before moving on to examine the other obstacles faced by FGM claimants in determining their credibility, it is also important to note that the explanations accepted as reasonable for such delays often do not consider gender-specific problems like sexual violence.³²⁶ For example, omissions of events like sexual violence from their application forms are commonly considered evidence that it probably did not happen.³²⁷ It is submitted that this constitutes discrimination against victims of FGM, in refugee status applications. FGM victims find themselves in an unfamiliar culture after fleeing their homes. Many will feel anxious about what will happen to them and in the vast majority of instances they will not know the correct procedures to follow and feel that it is safer to enter as a visitor.³²⁸ Furthermore, one interview may not be sufficient to obtain the

³²² Toubia N, "*Female Genital Mutilation: A Call for Global Action*" Women's Ink: New York, (1993), at 37.

³²³ Aherne, *supra* note 320 at 335. *See also*, INS Gender Guidelines, *supra* note 192, at 4-5.

³²⁴ *Olowo*, *supra* note 305, at 699-702.

³²⁵ Rice, *supra* note 76, at 2. *See also*, Aherne, *supra* note 320, at 335.

³²⁶ Drudy, *supra* note 270, at 108.

³²⁷ Rousseau C *et al*, *supra* note 1, at 57; *Jamil v SSHD* (Unreported), 25 June 1996 (13588) IAT: The applicant's claim was undermined by a failure to mention sexual violence on arrival at Heathrow. *See also* the decision of the Irish RAT relating to a young Ghanaian girl, where the tribunal member considered the failure of the claimant to report a sexual assault by the police at interview to undermine her credibility. Reference 10 (Ghana), Refugee Appeals Tribunal, Published Decisions, Volume 1.

³²⁸ Drudy, *supra* note 270, at 109. *See also*, *Toure v Ashcroft*, No. 03-1706, (1st Cir. 2005). In this particular case the claimant, a native and citizen of Guinea entered the US in 1996 with a visitor for business visa that

necessary information about sensitive sexual issues such as FGM; trust needs to be established before claimants may disclose information.³²⁹ As discussed in the previous section, victim advocates and good legal representation can help to empower claimants and overcome many of these issues. Moreover, despite the UNHCR and domestic gender-guidelines, women are still interviewed by male asylum officers/personnel, sometimes with the assistance of male interpreters.³³⁰ Victims of sexual violence as discussed in Chapter Two are reluctant to discuss their experiences in the presence of males, due to shame or fear that information may be passed on to her community, or due to the fact that, in many cases, FGM has been perpetrated by or on behalf of men.³³¹ Combined with a fear and distrust of authorities, these circumstances are likely to seriously hinder the capacity of a claimant to disclose details of her experience to a male interviewer or interpreter,³³² especially those from their locality or tribe. Accordingly, information disclosed at a later stage by the claimant should not be automatically disregarded or considered to reflect negatively on the credibility of the FGM claimant. As discussed above there are many reasons why women are not initially forthcoming with information about their experiences, and such delays will be further exacerbated if gender-sensitive interviewing procedures are not followed.³³³ As such, special care must be taken in relation to evidence pertaining to FGM and how that evidence is obtained. As will be discussed in my recommendations chapter, refugee determination hearings need to be gender-sensitive. Claimants should be assured that their hearing is private and that they

authorise her to remain for one month. She overstayed and requested asylum, withholding of removal, and relief under the Torture Convention. Part of her claim was based on her fear that both she and her daughter would be forced to undergo FGM. Due to a number of inconsistencies in her testimony, coupled with the fact that she had given false testimony at her husband's deportation hearing, she was deemed not to be a credible witness by the IJ. This determination, coupled with her inability to establish a fear of past or present persecution, resulted in the denial of her applications for asylum, withholding of removal and relief under the Torture Convention, by the IJ, BIA and Circuit Court. For a fuller analysis of this case and the credibility argument raised within it, please refer to the judgment which is available online at <http://caselaw.findlaw.com/us-1st-circuit/1348194.html> (last accessed 28/7/17).

³²⁹ Guidelines on the Protection of Refugee Women, *supra* note 271, para 72; UNHCR Gender Guidelines, *supra* note 7, para 36.

³³⁰ Drudy, *supra* note 270, at 109.

³³¹ *Ibid.* Refer also to Chapter Two.

³³² See, Chapter Two, discussing the examined gender-guidelines and their respective position on interpreters.

³³³ UK Gender-Guidelines, *supra* note 192, at 5.47; Asylum Policy Instruction: Gender Issues in the Asylum Claim *supra* note 63, at 13; CIRB Gender-Guidelines, *supra* note 192, at Section C & D; INS Gender-Guidelines, *supra* note 192, at 7.

are safe. A safe-environment coupled with representation or support will promote trust and possibly encourage women to be more open about their experiences. Following the approach of the specialised domestic violence courts, vulnerable and intimidated witnesses should be offered the use of special measures to give evidence. These provisions, including the use of video-taped evidence for example, would allow claimants to give their best evidence and help to relieve some of the stress associated with giving sensitive testimony.

As the following section will discuss, without such reforms and the continuation of the RDP in its current form, decision-makers will continue to ignore or pay lip service to the gender-guidelines. Without appropriate training and the enforcement of accountability measures, the discretion afforded to decision-makers allows them to continually assess credibility in a non-gendered manner to the detriment of claimants.

B. Cultural Differences

Cultural differences may be a particularly compelling problem for FGM claimants. To be considered credible, a claimant must show appropriate emotions at the appropriate moments. A study by Spijkerboer demonstrates that female claimants are more likely to be found incredible if they display too much or too little emotion. The study found that within the RDP, women are normatively associated with emotion rather than rationality, which is a male trait.³³⁴ Further, claimants who display inappropriate behaviour towards their families, such as leaving their husbands behind, are considered to lack credibility.³³⁵ This gender-specific difficulty is compounded for victims of FGM, whose deeply rooted traditions are the subject of the claim rather than a peripheral issue. An FGM claimant is in effect demonstrating her rejection of the social mores of her culture and in doing so dishonours her family and ruins her chances of marriage if deported.³³⁶ The moral dilemma of divided loyalties between her desire not to undergo FGM and the betrayal of her family and community can generate emotional difficulties for the claimant. The above

³³⁴ Spijkerboer, as cited in Drudy, *supra* note 270, at 109.

³³⁵ *Ibid.*

³³⁶ INS Resource Information Centre, US Department of Justice, Alert Series Women: Female Genital Mutilation (1996), at 16.

problems may give rise to vagueness, evasiveness or inconsistency, culminating in a finding of lack of credibility. This is evident in the following two FGM cases.

In the Canadian case of *P.O.G.*³³⁷ the claimant a thirty-five-year-old woman alleged a fear that her father, a devout Muslim would forcibly subject to her to FGM.³³⁸ She testified that on two separate occasions she was physically attacked during the night by her father and his siblings, who attempted to perform FGM on her.³³⁹ At the claimant's hearing, her evasive and histrionic demeanour undermined her credibility. The claimant was a statuesque woman, and it was determined implausible by the court that her elderly father would have attempted to abduct her. Whilst other factors, including discrepancies in her testimony, and the fact that the Ivory Coast had prohibited FGM also resulted in the court determining that she was not to be granted refugee status, her demeanour was nevertheless used by the court as a means of determining credibility. Whilst several other factors were used to justify dismissal in this case, the mere fact that this woman's age and appearance was used to undermine her credibility is erroneous. Appearances can be deceitful; at the time of the alleged attacks the claimant who was pregnant suffered a miscarriage, arguably therefore she was in a much more vulnerable state, both physically and mentally following her ordeal. Coupled with the emotional ramifications of having been attacked by family members, and having to flee her home and support networks, this claimant was arguably experiencing severe emotional difficulties which the court chose to ignore. Furthermore, whilst the claimant's father may have been elderly this does not necessarily mean that he was lacking in strength. The claimant also claimed that her father was aided in these attacks by family members. Furthermore, the evasive demeanour of the claimant could also be attributed to cultural and religious factors. Therefore, whilst not the sole factor for dismissal, demeanor in this case was used to establish a negative credibility finding which undoubtedly impacted on the case and its final determination.

Similarly, in *X (Re)*,³⁴⁰ the claimant alleged that she has been informed by her uncle that she had to be excised so that her blood could be used in a ritual sacrifice, of which her father was the cult leader. She fled to a neighboring village and was assisted in leaving

³³⁷ *P.O.G. (Re)* (20 May 1999) C.R.D.D. No. V98-01328 (1999).

³³⁸ *Ibid.*, at 1.

³³⁹ *Ibid.*, at 4.

³⁴⁰ *X (Re)*, 2003 CanLII 57467 (I.R.B.).

for Canada. The panel denied her claim for protection on credibility grounds.³⁴¹ Ms. X testified that she had attended university from 1993 to 1997, and worked in Douala, a large city, for two years following her graduation. From 1999 to 2001 she further testified that she had traveled back and forth between Douala and her village for the purposes of her own business. The panel refused to accept her fear or the fact that she sought refuge as far away as Canada to escape from “a few villagers participating in a secret cult”.³⁴²

Ms. X, further claimed that while her father had been promoted to ‘head’ of this secret cult, she knew very little about it. She also testified that while she was to be subjected to FGM, the practice was not routinely practiced within the cult.³⁴³ She further testified that she had escaped from her village and had remained hidden for three days at a woman’s home in a village located three kilometers from her home. She then claimed that she went to seek refuge with some nuns for ten days. Once there, she claimed that she left there one night and arrived in Douala the following day, assuring the panel that she had flown that same day. The panel questioned these sequence of events, determining that the dates in questions did not add up and she was subsequently denied protection.

This decision is disappointing; protection was denied merely because Ms. X could not account for her knowledge of the cult and secondly the error in dates. As there is no reference to the guidelines in the determination, it is fair to assume that they were either ignored or, in the instance that they may have been consulted, they were not properly interpreted. Firstly, if the guidelines had been consulted/properly interpreted, the claimant’s lack of knowledge concerning the cult would have been explained on account of the fact that in certain cultures, men do not share details of their political, military or even social activities with females.³⁴⁴ Secondly, a young woman fleeing FGM at the hands of her family, having to escape and find shelter with strangers in unfamiliar surrounding is an extremely daunting experience. Her psychological state coupled with the trauma of escape may also account for the discrepancy in dates. Arguably, the trauma which the claimant has endured was not considered when determining her credibility. Furthermore, the fact that the panel reasoned that the claimant was trying to escape a ‘few villagers

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ CIRB Gender Guidelines, *supra* note 192, at D.

participating in a secret cult'³⁴⁵ is evidence of their own gender and racial biases which resulted in a negative credibility finding. By trivializing the claimants fear and justifying denial in terms of social and/or religious custom (in this case FGM as practiced by a secret cult), the panel could make a determination on FGM which, from their comments, they did not understand and found difficult to comprehend.

Certainly, the lack of contextual and cultural understanding/sensitivity resulted in the panel focusing on insignificant details, which ultimately resulted in the denial of Ms X's claim. In other words, her credibility was used to refuse protection, instead of focusing on the objective evidence and applying the CIRB gender-guidelines in the appropriate manner. This case highlights not only the need for further clarification on credibility assessments within the CIRB gender-guidelines, it also lends support to the contention that there is a need for specific training (in gender and credibility issues) among decision-makers and their selection to panels based on their experience and expertise, including legal knowledge, psychological abilities, and experience in the field. Such expertise and training will effectively eliminate the risk of vicarious traumatization and make decision-makers more aware of how cultural differences may be a particularly compelling problem in FGM-related cases.

C. COI and Other Relevant Evidence

FGM claimants may face difficulties relating to the consistency of their account with COI. Whilst available COI may indicate that FGM is illegal and prohibited by the State, this does not necessarily mean that such laws are consistently enforced or that State protection is available.³⁴⁶ However, decision-makers may make an adverse credibility finding based on such inconsistencies. For instance, in a 2002 decision by the UK IAT, a negative finding was reached on credibility based on information on the prevalence and age at which FGM is performed.³⁴⁷ The claimant's entitlement to asylum was that she came from the village of Yopougon in Ivory Coast. She had a young son who lived with her partner

³⁴⁵ *X (Re)*, *supra* note 340.

³⁴⁶ UNHCR Gender Guidelines, *supra* note 7, para 11.

³⁴⁷ *DI (IFA - FGM) Ivory Coast CG* [2002] UKIAT 04437.

in Abidjan. She stated that it was the custom in her village for women between the ages of 18 and 30 to undergo FGM. Her mother is the head of the group of village women who perform the procedure. It was claimed that parents would force their daughters to be excised on reaching 18. It was the custom for excisions to be performed between August and December each year. The claimant said that she and her elder sister were due to be excised in August 2000. They had both avoided it for several years by going to live elsewhere in the Ivory Coast for months at a time. In August 2000, it was claimed that her sister returned to the village to attend the village feast and was forcibly subjected to FGM and consequently died.

The IAT in its determined reasoned that because a 1998 Ivory Coast law concerning crimes against women specifically forbids FGM, and imposes criminal sanctions on those who perform it, that State protection was available. This reasoning was based on objective evidence, which indicated that in 2000 two Ivorian women were arrested for practicing FGM on girls aged between 10 and 14.³⁴⁸ The court noted that, “although eradicating FGM is proving an uphill struggle, the objective evidence does indicate that the authorities will use the law to prosecute practitioners if they are brought to their attention”.³⁴⁹ The arrest of only two women within a period of four years of the law coming into force does not indicate that these laws are consistently enforced or that State protection is readily available. In fact, the FGM Guidance Note posits that:

For protection to be considered available, States must display active and genuine efforts to eliminate FGM, including appropriate prevention activities as well as systematic and actual (not merely threatened) prosecutions and punishment for FGM-related crimes. Factors indicating an absence of protection include a lack of effective legislative protection, lack of universal State control, and pervasive influence of customary practices.³⁵⁰

In actual fact, evidence submitted before the court, stated that, despite the enactment of the 1998 law and the two subsequent arrests, there is no national plan to assist in the

³⁴⁸ *Ibid*, para 28.

³⁴⁹ *Ibid*.

³⁵⁰ FGM Guidance Note, *supra* note 9, at 11. See also, *FB (Lone Women – PSG – Internal Relocation – AA (Uganda) Considered) Sierra Leone v SSHD*, para 69, UK Asylum and Immigration Tribunal, 27 November 2008, available online via at http://www.refworld.org/cases,GBR_AIT.4934f35a2.html (last accessed 28/7/17)

eradication of FGM, and it is still highly regarded as a severe problem.³⁵¹ Such evidence does not constitute a systematic and effective system of legislative protection, in fact it indicates the influence and prevalence of FGM within the Ivory Coast. Whilst FGM may have been legally designated a crime within the Ivory Coast, in practice it is not treated as such, with the result that there is little or no law enforcement to stop it.³⁵²

This case, as discussed in Chapter Two, further highlights the difficulties associated with the absence of any solid standard against which to assess the ability/willingness of the State to protect women. Arguably, in addressing FGM claims as will be discussed in Chapter Five, decision-makers should supplement their existing standards within their respective gender-guidelines with existing international standards, including that of the FGM Guidance Note, issued by the UNHCR, when required in such cases.

Returning to the issue at hand, a distinction may also be made between a claimant who fears the future performance of FGM and one on whom FGM has already been performed. Naturally, claimants who fear future FGM will have no physical evidence on which to base their claim, so their credibility will be of paramount importance. However, such accounts are often rejected as not-credible considering the age of the claimant or the level of State protection available, without sufficient consideration of the substantive practice of FGM or an examination of independent information concerning COI being undertaken.³⁵³ In *DI (IFA - FGM) Ivory Coast CG*, for example, the claimant testified that it was the custom in her village for women between the ages of 18 and 30 to undergo FGM. The court in dismissing her claim “found it incredible that the age range is so high”.³⁵⁴ This determination was made even though objective evidence was submitted which stated that:

the age at which mutilation is carried out varies from area to area. FGM is performed on infants a few days old, on children from 7 to 10 years old and on adolescents. Adult women also undergo operations at the time of marriage.³⁵⁵

³⁵¹ *DI (IFA - FGM) Ivory Coast CG*, *supra* note 347, para 17.

³⁵² FGM Guidance Note, *supra* note 9, at 11.

³⁵³ *See, DI (IFA - FGM) Ivory Coast CG*, *supra* note 347 (questioning both the age and availability of State Protection in the Ivory Coast).

³⁵⁴ *Ibid*, para 13.

³⁵⁵ *Ibid*.

Further, evidence was also submitted which revealed that some women undergo FGM during early adulthood when marrying into a community that practices FGM or just before or after the birth of the first child and that, “the procedure is carried out at a variety of ages ranging shortly after birth to sometime during the first pregnancy, but most commonly occurs between the ages of 4 and 8”.³⁵⁶ Arguably, a sufficient consideration of the practice of FGM and the accompanying COI was not undertaken, which had it of been a negative credibility determination arguably would not have been reached.

According to Drudy, the inherent difficulty for a claimant of producing documentary evidence to support her claim may require the decision-maker to pro-actively seek independent information.³⁵⁷ Whilst the respective gender-guidelines encourage decision-makers to gather information concerning the condition of women in many countries and to synthesise information from a range of sources,³⁵⁸ due to the non-binding nature of these guidelines, decision-makers do-not have to pro-actively seek such independent information. Such activism can be time-consuming and laborious, and decision-makers often do not engage in it, instead, “basing their decision on dubious assessments of plausibility of the account and general impression of the applicant’s credibility”.³⁵⁹ Coupled with the fact that reliable statistics are hard to come by, as sexual and physical violence against women is underreported at all levels because of shame, stigma and fear of retribution, the credibility of many claimants is undermined erroneously. Furthermore, in some cases there is the possibility that information on specific countries may not include information on FGM, leading decision-makers to believe that there are no specific problems in that country. Consequently, where this is the case decision-makers should not automatically deem the claimant to lack credibility, rather they should seek to obtain

³⁵⁶ *Ibid.*

³⁵⁷ Drudy, *supra* note 270, at 111.

³⁵⁸ Macklin A, “Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims” 13 Georgetown Immigration Law Journal 25, (1999), at 47. *See also*, UK Gender Guidelines, *supra* note 192, Section 5.50-51. Compare with, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 63, at 13-14 (which merely states that decision-makers should use information supplied by the COI Service when assessing objectively where there are reasonable grounds for believing that the applicant would, if returned to their country of origin, face persecution for a Convention reason); INS Gender Guidelines, *supra* note 192, at 8.

³⁵⁹ This was the main basis for the decision of the tribunal of first appeal in the Austrian case of *Re Cameroonian Citizen, Independent Federal Asylum Senate* (Austria), Decision of 21st March 2002, as cited in Drudy, *supra* note 270, at 111, note 154.

further evidence. Thus, if the guidelines were made legally binding and decision-makers were subsequently held accountable for their decisions, they would have to undertake such research and rely on objective evidence instead of dubious assessments of plausibility and credibility. Moreover, in some cases, where the COI relating to FGM contradicts the claimant's testimony, such information may not be put to the claimant, depriving them of the opportunity of providing more specific information.³⁶⁰ To ensure a fair hearing, claimants should be made aware of such contradictions, and be given the opportunity to provide further evidence instead of having their credibility undermined.

A claimant who has already been subjected to FGM will have physical evidence on which to base her claim, but may have difficulty in showing that she is at risk of further persecution. It is commonly believed that once FGM has been performed there ceases to be a credible fear of future persecution.³⁶¹ FGM as discussed has further implications beyond the initial procedure and decision-makers should be made aware of the fact that further cutting is required in the case of infibulation on a women's wedding night to allow sexual intercourse; infibulation may be performed again if a husband leaves for a long period of time, and after childbirth; cutting may also be required to allow a baby to emerge from the birth canal. This constant cutting and re-stitching is extremely painful and dangerous for women. Due to this fear and the psychological difficulties associated with it, claimants may be unable to communicate her story coherently, which can have a negative effect on the assessment of her credibility.³⁶² PTSD can have a particularly significant effect on the ability of a claimant to give a coherent account, thereby damaging her credibility. This difficulty will be, especially pertinent where the claimant fears a repeat of the procedure or where the claimant was herself a victim but now fears that her daughters will be subjected to the practice.³⁶³

³⁶⁰ *Moyolosa v The Refugee Applications Commissioners*, Unreported, High Court, 23rd June 2005, Clarke J. See also, Drudy, *supra* note 270, at 111.

³⁶¹ *Ibid.*

³⁶² *Ibid.*, at 112 (noting some of the psychological difficulties experience by claimants who fear future FGM).

³⁶³ On the issue of claimants fearing FGM being performed on their daughters see, Conroy, *supra* note 96. In the US alone from 2002 to 2005, seven of the Circuit courts decided fourteen cases in which parents sought protection based of their fear that their daughters would be subjected to FGM if deported. See *Abebe v Gonzales*, 432 F.3d 1037 (9th Cir, 2005) (en banc); *Axmed v US Att'y Gen.*, 145 F. App'x 669 (11th Cir, 2005) (unpublished opinion); *Jalloh v Gonzales*, 432 F.3d 894 (8th Cir, 2005); *Kawu v Ashcroft*, 113 F. App'x 732 (8th Cir, 2004) (per curiam) (unpublished opinion); *Olowo v Ashcroft*, *supra* note 305; *Abay v Ashcroft*, *supra* note 79; *Swiri v Ashcroft*, 95 F. App'x 708 (5th Cir, 2004) (per curiam) (unpublished

The FGM Guidance Note posits that the ‘permanent and irreversible’ nature of FGM, supports a finding that a woman or girl who has already undergone FGM, may still have a well-founded fear of future persecution.³⁶⁴ It further notes that she may fear that she may be subject to another form of FGM and/or suffer particularly serious long-term consequences of the procedure.³⁶⁵ In other words, decision-makers should be made aware of the fact that, there is no requirement that the future persecution feared should be identical to the one previously endured, if it can be linked to a Convention ground.³⁶⁶ The note further asserts that, even if FGM is considered to be a one-off past experience, there may still be compelling reasons arising from that past persecution to grant the claimant refugee status. This may be the case where the persecution suffered is considered particularly egregious, and the woman or girl is experiencing ongoing and traumatic psychological effects, rendering a return to the country of origin intolerable.³⁶⁷ The note

decision); *Azanor v Ashcroft* 364 F.3d 1013 (9th Cir, 2004); *Oforj*, *supra* note 287; *Obazee v Ashcroft* 79 F. App’x 914 (7th Cir, 2003) (unpublished order); *Osigwe v Ashcroft* 77 F. App’x 235 (5th Cir, 2003) (per curiam) (unpublished decisions); *Alade v Ashcroft* 69 F. App’x 771 (7th Cir, 2003) (unpublished order); *Key v INS* 64 F App’x 891 (4th Cir, 2003) (per curiam) (unpublished decision); *Philomena Iweka Nwaokolo v. INS*, US Court of Appeals (7th Cir.), No. 02-2964, 27 Dec. 2002. A fifteenth case was filed in a district court but was dismissed for a lack of jurisdiction. *See, Ayinde v Ashcroft*, No. 03 Civ. 358 (GWG), 2003 WL 22087473 (S.D.N.Y. Sept. 10, 2003). In nine of these cases, the courts addressed the merits of the claim, relying on a variety of legal theories and not surprisingly reaching conflicting conclusions. The decisions have resulted in a circuit split on the issue of granting asylum to these parents: Only the Sixth Circuit has granted asylum, whereas the Fifth, Seventh, Eighth, and Eleventh Circuits have refused to grant asylum. In respects of the UK and Canada, parent-child FGM have been examined in the following cases: *CRDD T97-03141*, May 27, 1998; *CRDD T98-04876 et al.*, September 14, 1999; *CRDD MA1-00356 et al.*, December 18, 2001; *CRDD A96-00453 et al.*, December 8, 1997; *X. v. Canada* (Immigration and Refugee Board), 2001 CanLII 26940 (I.R.B.); *Johnson v Secretary of State for the Home Department*, OH (2004); *CG (Kenya) v SSHD*, (2007) UKAIT 00041. For scholarly treatment on the subject of FGM and derivative asylum, *see generally*, Lasker A, “Solomon’s Choice: The Case for Granting Derivative Asylum to Parents” 32 Brooklyn Journal of International Law 231, (2006); Sowders K, “Parents Predicament: Theories of Relief for Deportable Parents of Children who face Female Genital Mutilation” 91 Cornell Law Review 913, (2005); Thronson D, “Choice-less Choices: Deportation and Child-Parent Relationship” 6 Nevada Law Journal 1173, (2006); Nessel L, “Forced to Choose: Torture, Reunification, and United States Immigration Policy” 78 Temple Law Review 907, (2005); Rice, *supra* note 76, at 9-10.

³⁶⁴ FGM Guidance Note, *supra* note 9, at 9.

³⁶⁵ *Ibid.*

³⁶⁶ *See, Matter of A-T- Respondent*, Decided by the Attorney General, 22 September 2008 available online at <http://www.unhcr.org/refworld/docid/48d8a0df2.html> (last accessed 28/7/17); *Khadija Ahmed Mohamed v. Alberto R. Gonzales, Attorney General*, US Court of Appeals, Ninth Circuit, 10 March 2005, available http://www.refworld.org/cases,USA_CA_9,423811c04.html (last accessed 28/7/17). The Court found that FGM amounts to “continuing and permanent persecution”.

³⁶⁷ FGM Guidance Note, *supra* note 9, at 9. *See also*, UNHCR Guidelines on International Protection No. 3: Cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (‘ceased circumstances’ clauses), HCR/GIP/03/03, 10 February 2003, paras. 20–21, available online at <http://www.unhcr.org/uk/publications/legal/3e637a202/guidelines-international-protection-3-cessation-refugee-status-under-article.html> (last accessed 28/7/17). *See also* *CRDD A96-00453 et al.*,

also recognises that parents may have a well-founded fear of their daughter(s) being subjected to FGM.³⁶⁸ Thus, existing gender-guidelines need to be amended to correspond with international developments on issues pertaining to gender-based forms of violence, including FGM. Arguably, if decision-makers were made aware of additional international guidance and developments in respect of FGM, provided with effective staff and properly trained in credibility issues, then the difficulties facing claimants who have a continuing fear of FGM would no longer be deemed an indication of untrustworthiness.

Claimants seeking protection based on FGM face considerable difficulties in proving their credibility. This difficulty is compounded by the non-binding nature of the UNHCR and domestic gender-guidelines. To avoid discriminating against FGM claimants (and indeed gender-based claimants in general) reforms, such as those stated, throughout this chapter are required and there must be some viable alternatives to the current approach adopted by decision-makers in respects of their adherence to and interpretation of their gender guidelines, and their approach to credibility assessments within RDP. This is evidently important in light of a 2013 report published by Amnesty International which found that decision-makers were misusing COI to undermine the credibility of applicants, and refuse their asylum claims, and the many commentaries on COI published by Still Human Still Here.³⁶⁹ Furthermore, in 2015 an independent inspector's report criticizing the use of COI by the UK Home Office in asylum applications was released.³⁷⁰ This report which found the Home Office to be using misleading and biased information, and distorting evidence to make it easier to reject claimants, concurs with many of the arguments discussed above not just in respects of credibility. Whilst, the 2015 report is a damning review of the COI used to make decisions on Eritrean asylum applications, it has been said that its findings are of concern for asylum claimants generally. The report

Canadian Refugee and Immigration Board, 8 December 1997, in which one of the applicants who had already undergone FGM was granted refugee status *inter alia* due to the atrocity of the persecution suffered and the psychological trauma that a return to such a society would entail.

³⁶⁸ FGM Guidance Note, *supra* note 9, at 7-8.

³⁶⁹ Amnesty International, "A Question of Credibility? Who So Many Initial Asylum Decisions are Overturned on Appeal in the UK", Still Human Still Here: UK, (2013).

³⁷⁰ Campbell J, "Review of UK Home Office Country Information and Guidance – *Eritrea: National (incl. Military) Service* (version 2.0e, September 2015) and *Eritrea: Illegal Exit* (Version 2.0e, September 2015: Prepared for the Chief Inspector of Borders and Immigration and the Independent Advisory Group on Country Information (IAGCI)", (2015). This report is available online via the Right to Remain website at <http://www.righttoremain.org.uk/blog/country-information-unreliable-evidence/> (last accessed 16/7/17).

supports my view that decision-makers do not always conform to the professional standards expected of them in refugee determinations and in interpreting the standards which country information reports are expected to meet. Instead they make determinations based on a highly selective use of information and some deliberately distort information to support their own assumptions.³⁷¹ This report raises the question of the problem of the systemic misuse of country information and guidance within the RDP.³⁷² According to the UK-based human rights organization Right to Remain, the current system is, “rotten, and needs to be completely overhauled if we are to have neutrality and objectivity, usability, validity, transparency and publicity, and quality control”.³⁷³

Conclusion

This chapter has found that the major decisions emanating from the chosen case-studies all recognize FGM as a basis for obtaining refugee status, and whilst later decisions reinforce these authorities to varying degrees, other decisions have departed from them. Arguably, *Kasinga*, *Farah* and *Fornah*, which were all decided during the implementation of the respective gender-guidelines were positively decided so that the case-study countries could be seen to be implementing these guidelines effectively. The reality as is evident from the case-law, is that the guidelines which are not binding and have no real legal force are rarely used and in instances where they are, gender-sensitive interpretations are lacking. These limitations allow gender, racial and cultural biases to prevail and deny FGM claimants protection.

Refugee determination and its associated processes, if viewed appropriately as an international obligation to protect against serious human rights violations, must offer protection to vulnerable individuals. Failure by a State to provide a fair and gender-sensitive mechanism in which claimants can present and have their claims heard is a, “legal injustice and a failure of the State and the international community to live up to

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ See, Right to Remain, “*Country Information: Unreliable Evidence*”, February (2016), available online via the Right to Remain website at <http://www.righttoremain.org.uk/blog/country-information-unreliable-evidence/> (last accessed 16/7/17).

their international obligations”.³⁷⁴ Arguably, by not consistently enforcing gender-guidelines, coupled with the use of single-panel members, deadlines and fast-track hearings (in some instances), the case-studies are permitting biases among decision-makers to prevail and in tandem are guilty of not providing a thorough, fair and gender-sensitive process for refugee determination. Whilst notable within each of the case-studies, this is perhaps more evident and at the same time erroneously justified within the US, in respects of the current BIA structure, discussed in Chapter Two. From the examined and referenced US FGM and other gender-related jurisprudence, whilst the vast majority of these decisions were decided in the affirmative and refugee status or subsidiary protection was awarded in some cases, and would appear to be an indication of the successful application of the INS gender-guidelines, they also inadvertently highlight procedural difficulties inherent within the US RDP, particularly the BIA. The fact that the majority of the US FGM case-law examined (both those indicating positive as well as and negative outcomes for applicants) was determined by the Circuit Courts (post 2002, which almost always hears cases in a “panel” of three judges) highlights the discontentment of claimants and their legal representatives with the current format of the BIA, and the quality of the decisions being delivered by single judges, who currently only provide one-sentence summary orders.

Arguably, in such complex cases, appeals to the Circuit Courts and unfair denials by the BIA could be avoided if the process before the BIA was reformed. This could be achieved by ensuring that at least two judges sit on refugee determination panels, or in instances where this is not possible make written opinions compulsory. These measures, as evident in cases such as *Kasinga*, highlight the importance and value of written decisions and the opinions of different decision-makers in reaching their decisions. Such measures would help to prevent bias, hostility and abusive conduct by decision-makers, and in doing so would ensure due process by making the RDP procedurally fair, improve the quality of decisions, and reduce the propensity of decision-makers to allow their ideological predilections and political allegiances to determine the outcomes in such highly sensitive cases. Similar arguments may also be levelled against the Canadian IRB

³⁷⁴ Drudy, *supra* note 270, at 115.

where single-member panels are the norm within the Refugee Protection Division³⁷⁵ and within the UK Immigration and Asylum Chambers, where similar panels may also be used.³⁷⁶ However, unlike its US counterpart, these appeals bodies do not endorse or instruct the use of one-sentence summary orders. Within the Canadian context, an IRB member can render his/her decision orally at the end of the hearing or send it in writing later. If the decision is negative, it must include the reasons in writing. If the decision is positive, written reasons are not given and the refugee claimant is given the status of “protected person”.³⁷⁷ Within the UK, determinations of the immigration judge, or panel, are always given in writing.³⁷⁸ Significantly, unlike its American appeals counterpart the ability to issue both oral and more importantly written opinions to refugee claimants ensures that IRB and UK decision-makers provide claimants with reasons which may, if needs be, be used to appeal to a higher authority on legal grounds. Nevertheless, despite these ‘good practices’, the failure of these bodies to effectively and efficiently implement their respective gender-guidelines, undermines their effectiveness and calls into question their commitment to protect victims of gender-based violence and uphold the tenets of due process within the RDP.

In sum, the key findings from this chapter are that some genuine FGM claimants are simply disbelieved by decision-makers. The fact that inconsistencies in evidence presented may have been due to trauma did not inform their assessment of credibility. Some of the case-law examined identified where late disclosure of sensitive information led to adverse credibility findings despite the existence of guidance that seeks to prevent this, namely the gender-guidelines. As some decision-makers were reluctant to recognise claimants as refugees on the basis of gender-related persecution, this created a higher threshold which was hard to meet. They also appeared reluctant to engage with the PSG ground. Even when COI was available, it was used selectively and sometimes

³⁷⁵ For further information on the Canadian RDP please refer to the Canadian Council for Refugees Website at <http://ccrweb.ca/en/refugee-reform> (last accessed 28/7/17).

³⁷⁶ This information has been obtained from the Tribunals Service: Immigration and Asylum Website available online at <http://www.tribunals.gov.uk/ImmigrationAsylum/> (last accessed 8/7/17).

³⁷⁷ Amnesty International, “*Refugee Protection in Canada*”, (2010), available online via the Amnesty International website at <http://www.amnesty.ca/our-work/issues/refugees-and-migrants/refugee-protection-canada> (last accessed 28/7/17).

³⁷⁸ For further information on the UK asylum system please refer to the Gov,UK Website at <http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccesfulapplications/appeals/system/> (last accessed 17/7/17).

unrepresentatively in support of negative determinations. In addition, the concept of IFA was generally considered in a cursory manner without any detailed engagement with the specific circumstances of the claimant. Finally, the gender-guidelines were either completely ignored or wrongly interpreted. Women have been negatively affected by the RDP. Research describes them feeling uninformed and finding the process distressing.³⁷⁹ Given the need to consider gender-based claims for asylum in a gender-sensitive manner, the poor quality of decision-making evidence in this chapter through the reference reports and FGM case-law is “unsustainable and must be addressed through systematic action and reform”.³⁸⁰

Whilst the findings in this chapter, highlight the weaknesses and ineffectiveness of the RDP’s of the case-studies and their respective gender-guidelines, innovative and progressive procedural reforms have happened at both the international and domestic levels which clearly highlight that, despite the haphazard application of human rights norms within the refugee context, there is a clear movement at the domestic level towards a zero-tolerance of violence against women. Domestic violence is no longer tolerated and in response to the international recognition of domestic violence as a societal problem, the court systems in many Western jurisdictions have begun to re-examine their approaches to this immensely complex issue more closely. Traditionally, the domestic criminal justice systems, like the RDP, involved little or no special attention or resources in respect of domestic violence cases. This approach has been challenged by the emergence of Specialised Domestic Violence Courts. Before proposing solutions and elaborating upon some recommendations mentioned throughout this chapter to remedy the inconsistent and inadequate treatment of FGM within the RDP, the protective functions of specialised domestic violence courts and programmes for victims will now be examined. Chapter Four will examine how the shift in attitudes and practices towards the equally multi-faceted problem of domestic violence might be replicated or mirrored in some shape or form within the RDP.

³⁷⁹ Muggeridge, *supra* note 130, at 67.

³⁸⁰ *Ibid*, at 68.

Chapter Four

The Violence We Ignore No More:

Specialist Domestic Violence Courts - Protection & Accountability

Introduction

Despite decades of reform, fundamental failures have persisted in undermining the criminal justice's systems response to domestic violence. Public awareness, the perception that it is unacceptable, and the political will to effect reform, have increased, resulting in substantial improvements on the legislative front.¹ Like the criminal response to FGM,² the case-studies have civil and criminal laws to protect victims, and governments have appropriated considerable funding of further efforts to combat the problem.³ Nevertheless, in contrast to the progress made by legislators, those responsible for applying and enforcing the law and its associated processes traditionally remained

¹ See, Buzawa E & Buzawa C, “*Global Response to Domestic Violence*”, Springer International Publishing: United States, (2017), Chapter One.

² FGM has been a criminal offence in the UK since 1985. In 2003, it also became a criminal offence for UK nationals or permanent UK residents to take their child abroad to have FGM. See, Serious Crime Act 2015 & Female Genital Mutilation Act 2003. In 1997, the Parliament of Canada passed an amendment to the Criminal Code of Canada expressly prohibiting all forms of FGM in Canada. Under the code, it is prohibited to aid, abet or counsel such assault and to interfere with genitalia for nonmedical reasons. Moreover, the amendment expressly prohibits the transport of a child outside of Canada for the purpose of obtaining FGM. See, *Bill C-27: An Act to Amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, 2nd Sess, 35th Parl, 1997. Similarly, performing FGM on anyone under the age of 18 became illegal in the U.S. in 1997 with the *Federal Prohibition of Female Genital Mutilation Act*. By 2015, 24 States have specific laws against FGM. See, *Federal Prohibition of Female Genital Mutilation Act of 1995*

³ Epstein D, “*Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*”, 11 *Yale Journal of Law and Feminism* 3, (1999), at 4. For legislation, policy and guidance on the criminalisation of domestic violence in the UK please refer to the NSPCC website at <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/domestic-abuse/legislation-policy-and-guidance/> (last accessed 29/7/17). In the US, federal legislation has been enacted making domestic violence a crime, most notably the Violence Against Women Act 1994. However, the vast majority of domestic violence offenses are prosecuted under state law. Similarly, in Canada, whilst there is no specific offence of family violence in the *Criminal Code*, most acts of family violence are crimes in Canada and threatened accordingly. As of 2017, six provinces (Alberta, Manitoba, Nova Scotia, Prince Edward Island, Newfoundland and Labrador and Saskatchewan) and three territories (Northwest Territories, Yukon and Nunavut) have proclaimed specific legislation on family violence. For further information on domestic violence laws in Canada, please refer to the Department of Justice website at <http://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html> (last accessed 29/7/17).

stagnate. The system remained largely, unresponsive and orientated towards non-enforcement.⁴

Like the examined gender-guidelines, laws and guidelines are only as good as the system which delivers on its promises, and the failure of the courts and related institutions to keep up with legislative progress had a detrimental impact on efforts to combat domestic violence. This gap, between the ‘responsive’ legislative branch and the ‘unresponsive’ judicial and executive branches, evidentially identified where the next generation of reforms had to be focused: a fundamental restructuring of the traditional justice system’s approach and processes to domestic violence and its attitudes towards victims of domestic violence. The solution was the establishment of specialised domestic violence courts to address growing concerns throughout the social and criminal justice systems. These concerns relate to both the nature and extent of domestic violence and were developed to provide a comprehensive, substantive, and long-term solution to the problems related to domestic violence.⁵ These unique courts are pioneering in that whilst they hold perpetrators accountable, they focus on victim support and safety.⁶ Meaningfully, for the purposes of this thesis, these courts convey the idea that specific forms of violence merit special attention by separating the domestic violence court process from the traditional criminal court process.⁷

Considering the inherent limitations of the existing RDPs and gender-guidelines, coupled with the apparent reluctance of decision-makers to leave their biases/preconceptions outside of the RDP, this chapter aims to examine how the shift in attitudes and practices towards domestic violence within the domestic criminal justice

⁴ It was customary practice for police to refuse to arrest perpetrators, prosecutors to decline to press charges, and for judges to be reluctant to issue civil protection orders or impose significant sentences on perpetrators. For further discussion on this reluctance see Epstein, *supra* note 3, at 4. See also, Tsai B, “*The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*”, 68 Fordham Law Review 1285, (2000), at 1286 (noting the frustration and embarrassment of those who work within the criminal justice system at their inability to protect victims of domestic violence, even after the arrest and prosecution of perpetrators and despite the issuance of protection orders).

⁵ See, Grossi E, “*Domestic Violence Courts*”, 2 The Encyclopaedia of Crime and Punishment 510 (2016).

⁶ Centre for Justice Innovation, “*The Case for Dedicated Domestic Violence Courts*”, (2014), available online via the Centre for Justice Innovation website at <http://justiceinnovation.org/portfolio/the-case-for-dedicated-domestic-violence-courts/> (last accessed 18/6/17).

⁷ Karan A *et al*, “*Domestic Violence Courts: What are they? And How Should We Manage Them?*”, 1 Juvenile and Family Court Journal 75, (1999), at 75.

systems of the case-studies may be replicated in some shape or form within the RDP. This innovative shift is important for two reasons. Firstly, it would ensure that States give credence to their respective gender-guidelines by singling gender-based forms of violence, in this case FGM out for special attention in specialized courts/hearings. Secondly, this transposition will arguably establish a thorough, fair and effective mechanism through which genuine FGM claimants can present and have their claims heard in a gender-sensitive manner.

Part One outlines the traditional court system's response to domestic violence and its failings. It further introduces the concept of therapeutic jurisprudence as a basis for creating a practical alternative approach. Part Two examines several model domestic violence courts which incorporate therapeutic jurisprudence theories into their approaches to combating domestic violence. The case studies were chosen firstly due to accessibility of information. Despite the admiration of these courts there is a paucity of literature on the subject.⁸ The limited research that does exist appears to have been conducted largely by government agencies and special interest groups.⁹ Secondly, the chosen case studies exemplify a comprehensive interdisciplinary system of handling and addressing domestic violence cases, which the RDP can learn from. Whilst adhering to the fundamental values that must guide all domestic violence case processing and addressing their objectives, each court should reflect the culture of the jurisdiction in which it operates and the needs of the population it serves. The development and implementation of a specialized domestic violence court involves concrete decisions by court personnel and multiple partner agencies on many detailed issues, and no two courts will be exactly alike. This section provides ten case studies, to provide tangible examples of existing domestic violence courts. While each is quite different in structure, they all share the principles and core components of effective domestic violence courts. They bring to life some of the strengths of various court models, and demonstrate how issues and challenges faced by any court can be addressed productively. These studies are designed to illustrate the

⁸ Graham C, "*The Ottawa Specialized Domestic Violence Court: A Case Study*", MA. Thesis, Canada, (2004), available at <file:///C:/Users/user/AppData/Local/Microsoft/Windows/INetCache/IE/G3VTB041/graham-theottawaspecializeddomesticviolencecourt.pdf> (last accessed 20/7/17), at 2.

⁹ *Ibid.*

different kinds of court models, and provide valuable lessons which may be transposed into the RDP to remedy the inconsistent and in some instances the inadequate treatment of FGM refugee claims. Finally, this chapter offers a number of conclusions and posits that like the criminal justice response to domestic violence, the RDP of the case-studies need to improve their responses to FGM and gender-based violence. A coordinated partnership approach to FGM and specialist support services for claimants within a specialist setting would ensure that women have access to a fair, accommodating and gendered process, one well removed from the current lottery system.

I. The Traditional Legal Response to Domestic Violence and the Development of Therapeutic Domestic Violence Courts

A. Historical Perspective: Domestic Violence within the Criminal Justice System

Domestic violence is physical, psychological, sexual or financial violence which occurs within intimate or family-type relationships and forms a pattern of coercive and controlling behavior. Traditionally the private nature of domestic violence resulted in societal reluctance to acknowledge its existence and pervasiveness, or to criminalize perpetrators actions. The legal systems of the case-studies have a long history of complicity in and approval of intimate violence, particularly when perpetrated by husbands against their wives and children.¹⁰ Such violence was accepted by society and the legal system as a private family matter in which a husband could use force to discipline the members of his household.¹¹ Consequently, husbands were immune to criminal

¹⁰ Epstein, *supra* note 3, at 9.

¹¹ *State v Rhodes*, 61 N.C. 349, 351 (1968) (describing the family as an entity unto itself which the government should not disturb); *Skinner v. Skinner*, 5 Wis. 449, 451 (1856) (refusing a wife a divorce on the grounds of cruel or inhuman treatment, stating that "when the wife is ill-treated on account of her own misconduct, her remedy is a reform of her own manners"); Buzawa E & Buzawa C, "Domestic Violence: The Criminal Justice Response" Sage Publication: London (1996), at 26. But see, *Commonwealth v McAfee*, 108 Mass. 458, 461 (1871) (stating that it was unlawful for the defendant to beat his wife); *State v. Buckley*, 2 Del. 552, 552 (1838) ("We know of no law that will authorize a husband to strike his pregnant wife a blow with his fist "); Taub N, "Adult Domestic Violence: The Law's Response", 8 *Victimology* 152, (1983), at 153 (women were considered to be the property of their husbands and were subject to 'moderate chastisement').

sanctions.¹² Fortunately, as society has progressively evolved so too has the role which legal institutions play in the eradication and treatment of domestic violence.¹³

The historical reluctance of the courts to interfere in family matters emphasizes the widely held belief that the family was its own private entity. Until the late 1800s, the criminal justice systems of the case-studies were a 'legislative vacuum' when it came to policies against domestic violence.¹⁴ It was only with the advent of the Modern Period¹⁵ and the American Civil War, that Western governments began to exert more authority over families through greater regulation and legislation.¹⁶ By the end of the 19th century, numerous countries had adopted laws prohibiting wife-beating.¹⁷ Evidence, however, suggests that laws were rarely enforced, and sanctions applied only in extreme circumstances of unequivocal and severe injury.¹⁸

¹² *State v Rhodes*, *supra* note 11, at 351. In this particular case, the Supreme Court of North Carolina addressed the question of whether a husband could be punished for unprovoked and moderate correction of his wife, and stated that "we will not interfere with family government in trifling cases" where "personal conflicts inflicting only temporary pain ... are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber". *Ibid*, at 352-3. *See also*, Schechter S, "Women and male violence", Boston, MA: South End Press, (1982) (noting that until 1829, in England, a husband had absolute power of chastisement without the threat of sanction).

¹³ Tsai, *supra* note 4, at 1288. *See also*, Fagan J, National Institute of Justice Research Report, *The Criminalization of Domestic Violence: Promises and Limits*, National Institute of Justice Research Report, (1996), at 6-9. This Report is available online at <http://www.ncjrs.gov/pdffiles/crimdom.pdf> (last accessed 4/7/17).

¹⁴ Buzawa & Buzawa, "Domestic Violence: The Criminal Justice Response", *supra* note 11, at 30-31.

¹⁵ Dobash R & Dobash R, "Violence Against Wives" Free-Press: New York, (1979), at 48 (discussing changes in political, economic, and religious institutions of society in the modern era).

¹⁶ For instance, in the US the Supreme Court of Alabama in *Fulgham v State*, determined for the first time that a husband did not have the right to beat his wife, and that a "wife is entitled to the same protection of the law that the husband can invoke for himself". 46 Ala. 143 (1871), at 147. *See also*, Tsai, *supra* note 4, at 1289; Buzawa & Buzawa, "Domestic Violence: The Criminal Justice Response", *supra* note 11, at 31 ("The second half of the nineteenth century involved major societal upheavals," including the Civil War, the emergence of the women's movement, and landmark court decisions limiting the legality of domestic abuse).

¹⁷ Buzawa & Buzawa, "Domestic Violence: The Criminal Justice Response", *supra* note 11, at 32 (discussing US States responses); Foyster E, "Marital Violence: An English Family History 1669-1857", Cambridge University Press: Cambridge, (2005) (highlighting that courts expressed concern for the emotional consequences of marital violence, predating the change in judicial attitudes in the nineteenth century); Dobash & Dobash, "Violence Against Wives", *supra* note 15, at 56 (discussing community limits and controls upon a husband's chastisement powers).

¹⁸ Buzawa & Buzawa, "Domestic Violence: The Criminal Justice Response", *supra* note 11, at 32. *See also*, Dobash & Dobash, "Violence Against Wives", *supra* note 15, at 58-9 (noting that when a husband transgressed the boundaries of allowable punishment, he would often become the subject of ridicule of his family, friends and neighbours. Although rare, such an event remained relatively light-hearted in comparison with community condemnation of recalcitrant wives).

In the early 1900s, issues pertaining to temperance and suffrage emerged¹⁹ and attention to domestic violence waned. Judicial trends reflected a move away from, “concern over domestic violence by de-emphasizing the criminal nature of domestic abuse and focusing once again on compromise and reconciliation of the family”.²⁰ Family courts were established to help dispense with family cases by helping couples work out their ‘differences’.²¹ Renewed attention to family violence arose in the 1960s through the work of members of the feminist movement in establishing rape crisis centers and battered women’s shelters.²² The establishment of victim assistance programmes followed closely thereafter.²³

By the 1970s, the subject of domestic violence was further thrust into public consciousness with the establishment of programs, shelters, specialized prosecutions, and studies on the incidence of domestic violence.²⁴ Inopportunately, legal institutions responded with uncertainty and continued to view domestic violence as personal matters not suitable for prosecution.²⁵ With continue focus and changing attitudes the 1980s and 1990s witnessed changes in the handling of domestic violence cases. Reforms brought the establishment of domestic violence prosecution units, the emergence of perpetrator treatment programmes, arrest strategies and the adoption of protection order reforms to improve emergency access and widen the options available to victims for legal relief.²⁶ The theory that criminal accountability would reduce violence drove much of the domestic violence legislation enacted in the 1990s throughout the respective case-studies and resulted in more stringent policies on prosecution, arrest and incarceration of perpetrators. These reforms helped shape society’s perception of domestic violence as a

¹⁹ Buzawa & Buzawa, “*Domestic Violence: The Criminal Justice Response*”, *supra* note 11, at 32-3.

²⁰ Tsai, *supra* note 4, at 1290.

²¹ Buzawa & Buzawa, “*Domestic Violence: The Criminal Justice Response*”, *supra* note 11, at 33; *See also*, Pleck E, “*Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present*” Oxford University Press: New York, (1989), at 137 (“The official policy of courts of domestic relations was to urge reconciliation (‘home mending’) whenever possible.”). The city of Buffalo, New York, is the home of the US first domestic relations court, founded in 1910 to handle all family-related criminal matters. Pleck, *ibid*, at 136.

²² Fagan, *supra* note 13, at 7.

²³ *Ibid*. *See also*, Tsai, *supra* note 4, at 1290.

²⁴ *Ibid*. *See also*, Shaffer C, “*Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*”, 27 Seattle University Law Review 981, (2004), at 982.

²⁵ Fagan, *supra* note 13, at 8.

²⁶ *Ibid*, at 9-11. *See also*, Tsai, *supra* note 4 at 1290-1.

crime.²⁷ Society has moved from an era where no term for intimate or domestic violence existed in the national lexicon to one of substantial public awareness of the problem, a growing perception that it is unacceptable, and increasing political will to intervene.²⁸

Defining domestic violence is difficult and definitions vary depending on the context is used.²⁹ Niamh Reilly suggests that women and girls are more likely to be subjected to human rights abuses in the private contexts of family, intimate relationships, informal economic activity, culture, or religion.³⁰ In support of that assertion this thesis posits that the term domestic violence is an umbrella term that is inclusive of violence amongst any family members but can also include violence between individuals who are not family members.³¹ With the recognition of forced marriage, gender violence and honor-based violence as forms of domestic violence,³² it is argued that definitions of domestic violence continue to change as we learn more about the nature of the issue. Definitions thus develop to accommodate innovative ways of seeing or contextualizing, for example FGM as a form of domestic violence. It is this recognition, that enables us to borrow ideas and learn from the domestic violence courts. Although definitions and legislation vary from country to country and State to State and some gaps in cover certainly remain, legislation and enforcement, are no longer an obstacle, but a source of hope for domestic violence victims. Enormous legal strides have been made in a relatively brief period, contributing to current processes to aid and protect victims within these courts from this complex form of gendered violence. Unfortunately, similar proactive strides have yet to permeate the RDP, despite the implementation of gender-guidelines and their calls for the adjudication of gender-based claims in a gender-sensitive manner, with any real efficiency. The following section will now look at some of the flaws inherent within the criminal justice system to identify any similarities with the current position of the RDP.

B. Criticisms of the Traditional Legal Systems Approach to Domestic Violence

²⁷ Taub, *supra* note 11, at 158.

²⁸ Epstein, *supra* note 3, at 11.

²⁹ Groves N & Thomas T, “*Domestic Violence and Criminal Justice*”, Routledge: London, (2014), at 11.

³⁰ See, Reilly N, “*State Accountability for Women’s Human Rights in Ireland*”, University College Dublin: Women’s Education Research and Resource Centre, (1997).

³¹ Groves & Thomas, *supra* note 29, at 6.

³² *Ibid*, at 5-10.

The ‘criminalization’ of domestic violence has sought to correct the historical, legal, and moral disparities in the legal protections afforded to victims.³³ With statistics estimating, worldwide, 35% of women have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence,³⁴ the modern legal system has responded to this crisis and adapted itself to changing social needs.³⁵ Arguably, if the RDP remains static and not gender sensitive, procedural and evidentiary injustices will continue and the risk of genuine FGM claimants being denied protection remains considerable.³⁶

One criticism of the traditional legal system’s handling of domestic violence cases is its inability to ‘stem the tide of domestic violence’³⁷ as evidenced by the sheer numbers of victims. Available statistics estimate that millions of victims from all forms of relationships, backgrounds and orientations annually experience violence at the hands of intimate partners or family members.³⁸ These statistics indicate that the legal system’s approach requires further improvements and that stringent policies on arrest, prosecution and imprisonment are not wholly effective deterrent mechanisms.

A second criticism concerns the inadequacy of protection orders to prevent further or future abuse.³⁹ An order of protection can prohibit a person from harassment, physical

³³ Zorza J, “*The Criminal Law of Misdemeanour Domestic Violence, 1970-1990*”, 83 *Journal of Criminal Law and Criminology* 240, (1992), at 240-279.

³⁴ García-Moreno C & Pallitto C, “*Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*”, World Health Organisation: Italy, (2013), at 2. This report is available online via the WHO Website at http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf (last accessed 28/6/17).

³⁵ Kaye J, “*Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*” 48 *Hastings Law Journal* 851, (1997), at 853 (arguing that a legal system remains viable only if it responds to the present-day needs and concerns of the public).

³⁶ See generally, Ceneda S & Palmer C, “*Lip Service or Implementation? The Home Office Gender Guidance and Women’s Asylum Claims in the UK*”, *Asylum Aid*: London, (2006), at 11-12.

³⁷ Tsai, *supra* note 4, at 1292.

³⁸ See, National Coalition Against Domestic Violence, “*Domestic Violence: National Statistics*”, (2015), available online at

<https://ncadv.org/files/National%20Statistics%20Domestic%20Violence%20NCADV.pdf> (last accessed 29/7/17) (referring to the US). See also, Burczycka M & Conroy S, “*Family violence in Canada: A statistical profile, 2015*”, Canadian Centre for Justis Statistics, (2017), available online at <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14698-eng.pdf> (last accessed 29/7/17) (referring to Canada); Office for National Statistics, “*Compendium: Domestic abuse, sexual assault and stalking*”, February (2017), available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2016/domesticabusesexualassaultandstalking> (referring to the UK).

³⁹ Canada and the US tend to refer more to Orders of Protection, whereas such domestic violence remedies are more commonly referred to as restraining or non-molestation orders in the UK. To maintain

and verbal abuse, intimidation, or interference with personal liberty and also provides for a ‘stay away order’.⁴⁰ Regrettably, research suggests that such orders alone are ineffective and do not deter future violence.⁴¹

A third criticism is the systems inability to identify which perpetrators are lethal and which ones are not. Whilst, domestic violence deaths are unpredictable, Tsai argues that the legal system is unable to accurately prioritize and target lethal cases.⁴²

A fourth criticism is the often-cursory treatment of domestic violence cases in court. Domestic violence is a multifaceted problem, involving issues of family dynamics and emotional relationships that are uncharacteristic of other crimes. Its uniqueness requires additional time and attention, as they often complicate otherwise straightforward situations.⁴³ Perfunctory treatment fails to adequately address the particulars of the underlying problems inherent in such cases. Accordingly, this may result in a lack of support and resources for victims as well as accountability mechanisms for perpetrators “ultimately culminating in insufficient methods of confronting the incidence of domestic violence”.⁴⁴

Finally, organizational bias and attitudes reflected by officials working in the legal system may contribute to the system’s ineffectiveness. Like FGM, domestic violence has long been regarded as a cultural or private matter.⁴⁵ Legislation can only go so far without effective enforcement. For instance, Cheryl Hanna posits that prosecutors may give

cohesiveness and reinforce the importance of such remedies, the use of the term ‘Orders of Protection’ will be used throughout this chapter.

⁴⁰ See, Tsai, *supra* note 4, at 1292.

⁴¹ See Gunnison E *et al*, “*Women, Crime and Justice: Balancing the Scales*”, Wiley-Blackwell: London, (2016), at 171. See also, Buzawa E & Buzawa C, “*Do Arrests and Restraining Orders Work?*” Sage Publications: London, (1996), at 240; Buzawa & Buzawa, “*Domestic Violence: The Criminal Justice Response*”, *supra* note 11, at 200-3 (discussing the general ineffectiveness of protection orders in deterring future violence).

⁴² Tsai, *supra* note 4, at 1293. If the legal system accordingly had a method for predicting the lethality of perpetrators, such cases it is argued may have been subject to more stringent monitoring and enforcement, potentially averting the deaths of some victims. *Ibid*, at note 67.

⁴³ For example, a simple assault by a stranger may be a more straightforward case than a domestic violence assault by a husband on his wife. In a domestic violence case, the wife may depend on the husband for financial support and object to his arrest. She may fear for her safety and refuse to go forward with the prosecution. There may also be children involved, requiring considerations of custody, visitation, or support.

⁴⁴ Tsai, *supra* note 4, at 1294.

⁴⁵ See, Buzawa & Buzawa, “*Domestic Violence: The Criminal Justice Response*”, *supra* note 11, at 33 (suggesting that, “despite official policies to the contrary, many police officers and prosecutors still strongly believe that society should not intervene in domestic disputes except in cases of extraordinary violence”).

domestic violence cases low priority, because victims frequently withdraw from the prosecution, and cases are largely unsuccessful without victim support and participation.⁴⁶ Similarly, police officers may also contribute to this organizational attitude by disproportionately failing to arrest perpetrators in domestic violence cases⁴⁷

The traditional court response to domestic violence is erroneous, but not unique and many of the criticisms levelled against the system can, similarly, be levelled against the RDPs treatment of FGM claims. Firstly, decision-makers within the RDP do not have the legislative authority to thwart criminal and human rights violations. Whilst the criminal justice system aims to protect victims and hold perpetrators accountable, the RDP offers protection to those individuals fleeing persecution from further or future persecution. Although the two systems perform different functions, they both offer protection. Whilst the criminal justice system can be criticised for failing to prevent domestic violence, the RDP is also failing to recognise that FGM is a prohibited form of domestic violence. By failing to expand existing domestic violence definitions, which incorporates forms of violence committed exclusively against women such as FGM, the RDP is implicitly undermining the progress of the criminal justice system in combating violence against women.

Arguably, it is not the job or responsibility of the RDP to combat violence against women, however, it is submitted that refugee protection is analogous to the protection afforded to victims of domestic violence within the domestic courts. Refugee protection, like the criminal justice stance, conveys the message that violence against women, in all its forms, is unacceptable. Intrinsically, by prohibiting domestic violence, recognising it as a form of violence against women and eliminating its social and cultural underpinnings, all legal and quasi-judicial forums (including the RDP) must follow this reasoning and accept FGM as a form of violence against women, prohibited by statute. In other words, by setting a standard at one level means that in order for it to be effective it must be consistently followed throughout the entire legal and administrative system. Failure to do

⁴⁶ Hanna C, “*No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*” 109 Harvard Law Review 1849, (1996), at 1860.

⁴⁷ Tsai, *supra* note 4, at 1294. Research has shown that in domestic violence situations, there is, still persistent bias against the use of arrest”, and the more closely related the parties involved are, the less likely officers are to arrest. See, Buzawa & Buzawa, “*Domestic Violence: The Criminal Justice Response*”, *supra* note 11, at 51.

so undermines the progress of the criminal justice system in combating violence against women and calls into question the commitment and obligation of the RDP to offer protection to women. Arguably, this inconsistent approach, and the failure to recognise FGM as a human rights violation is contributing to the disparities in existing determinations. Possibly, training in issues pertaining to violence against women, including domestic violence is one progressive way of improving and engendering the RDP. Such recognition may make FGM a more fathomable and approachable form of violence, which decision-makers may feel more comfortable when addressing, as the cultural element of the practice will be eliminated.

Secondly, like orders of protection, within the RDP, an IFA conveys the message that further or future violence is preventable if a claimant relocates. The ability to relocate does not necessarily mean that future violence will not occur. In fact, as the FGM case-law has highlighted, an IFA in some cases is unreasonable as it may actually place the claimant in an unduly harsh situation and subject her to the risk of future harm and additional difficulties.⁴⁸ Unless the gender-guidelines are interpreted in a gender-sensitive manner and sufficient attention given to COI in respects of FGM, claimants, like victims of domestic violence will remain at risk of harm, despite the existence of ‘supposedly’ protective remedies.

Thirdly, like the inability of the legal system to identify which perpetrators are lethal, the RDP is similarly faced with the inability to consistently identify which States pose a threat to FGM claimants. Primarily, due to the non-binding nature of the gender-guidelines, coupled with human and financial constraints, decision-makers do not have to proactively seek comprehensive information.⁴⁹ Such activism, can be time-consuming

⁴⁸ See specifically, CRDD T97-03141, May 27, 1998. For a case summary see, IRB, “*Compendium of Decisions, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update*”, February (2003), at 32. This compendium is available online via the IRB Website at <http://www.refworld.org/docid/4713831e2.html> (last accessed 7/7/17). Refer also to the discussion of *NK (Cameroon) v SSHD*, [2004] UKIAT 00247 in Chapter Two (noting the problems associated with wrongly construing the existence of an IFA for FGM victims).

⁴⁹ Macklin A, “*Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims*” 13 Georgetown Immigration Law Journal 25, (1999), at 47 (discussing the Canadian IRB Documentation Centres); See also, *Asylum Gender Guidelines*, Immigration Appellate Authority, UK, Nov. 2000, (hereafter referred to as the UK Gender guidelines), Section 5.50-51. Compare with, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, Home Office, October 2006, at 13-14 (which merely states that decision-makers should use information supplied by the COI Service when assessing objectively where there are reasonable grounds for believing that the

and laborious and decision-makers often do not engage in it, instead, “basing their decisions on dubious assessments of plausibility of the account and general impression of the applicant’s credibility”.⁵⁰ Coupled with the fact that reliable statistics are hard to come by, as sexual and physical violence against women is underreported at all levels, the credibility of many claimants as discussed in Chapter Three is erroneously undermined. Refugee decision-makers, like judges are perceived as impartial fact-finders⁵¹ in the pursuit of justice. Whilst it may be argued that they do not have the time or resources to undertake COI research,⁵² their position places a responsibility on them to undertake this task and be trained in how to do it correctly, or have in place a research team to help them undertake this vitally important task, as is the case in some of the specialised domestic violence courts.⁵³

Fourthly, the criminal justice and refugee systems within the case-studies are stretched to capacity with heavy caseloads. Consequently, FGM claims can be treated in a cursory manner and placed within fast-track systems. FGM is a complex form of gender-violence and claimants have special procedural and reception needs. Fast-track procedures lack the rigor, sensitivity and multi-agency coherence needed in such cases. The UNHCR has,

applicant would, if returned to their country of origin, face persecution for a Convention reason); *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995, Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service, USA, p. 1 (hereafter INS Gender Guidelines), at 8.

⁵⁰ This was the main basis for the decision of the tribunal of first appeal in the Austrian case of *Re Cameroonian Citizen, Independent Federal Asylum Senate* (Austria), Decision of 21st March 2002, as cited in Drudy A, “*Credibility Assessments and Victims of Female Genital Mutilation: A Re-Evaluation of the Refugee Determination Process*”, 14 Irish Student Law Review 84, (2006), at 111, note 154.

⁵¹ Hart W & Blanchard R, “*Litigation & Trial Practice*”, (6th ED), New York: Thomson Delmar Learning, (2007), at 70.

⁵² See, Immigration Advisory Service, “*The Refugee Roulette: The Role of Country Information in Refugee Status Determination*”, (2010), available online at <http://www.refworld.org/docid/4b62a6182.html> (last accessed 1/7/17) (hereafter referred to as the COI Report). An Executive Summary of the COI Report is also available online at (last accessed 1/7/17) (hereafter referred to as the COI Executive Summary) (alluding to the financial and time constraints associated with accessing and examining COI among legal representatives).

⁵³ Arguably, if legally-binding gender-guidelines were enforced and decision-makers were held to account for their decisions, COI supplied by the various agencies already used by case-studies and supported with further independent and up-to-date research undertaken by decision-makers would potentially make it easier to accurately determine whether claimants face further risk of harm, or whether a viable IFA and State protection exists. Collaboration among the case-studies in respect of accessing information may also be a particularly useful tool in respects of ensuring that comprehensive and reliable information is obtained and presented in FGM determinations.

equally, noted its concern that fast-track procedures are not gender-sensitive⁵⁴ and others have documented how gender-related claims require additional time and attention.⁵⁵

Lastly, like domestic violence, FGM, is largely regarded by some decision-makers as a cultural and religious matter which does not merit State intervention. Cultural practices do not lose their criminal label simply because some demand that they be labelled as such. This predisposition needs to be eliminated and the criminal prohibitions of FGM and domestic violence implemented by the respective case-studies need to be reinforced throughout the RDP to ensure that decision-makers are aware of the fact that FGM is a domestically criminally prohibited practice and not a legally condoned practice. Even though decision-makers may assume that because laws prohibiting FGM exist within the country of origin, State protection exists; determining State protection as discussed throughout this thesis is difficult in light of the fact that no universally recognised standard exists. Arguably, refugee determinations should be made with the laws of the host state and their standards of State protection in mind. This would give decision-makers a benchmark against which to compare the standards of protection within the country of origin against the standards afforded to women within their own borders.

Therefore, while their functions are different the criticisms levelled against the criminal justice systems' traditional approach to domestic violence can similarly be levelled against the refugee determination systems' treatment of FGM. Arguably, the current approach taken in respects of gender-based claims, including FGM, is failing to address the needs of claimants. Protection for victims, in both forums will continue to be undermined if reforms are not forthcoming. Whilst, the conventional court system's response to domestic violence cases can be woefully inadequate, an alternative, more innovative approach to domestic violence has been implemented by the legal systems of the case-studies. Therefore, in order to learn from this new approach, so that similar innovations may potentially be transposed into the RDP in an attempt to correct and more

⁵⁴ UNHCR, *Quality Initiative Report, Second Report to the Minister*, (2010), at 13. This Report is available online at <http://www.refworld.org/docid/56a9c4294.html> (last accessed 1/7/17).

⁵⁵ See generally, Ceneda & Palmer, *supra* note 36; Van Gulik G, "Women, Asylum and the UK Border Agency", Human Rights Watch, 23 February, (2010) (noting that, "The system is too fast to be fair. There is a general lack of information on women's rights in the countries they come from, women's credibility is sometimes wrongly assessed, and not enough time is allowed to talk about sensitive issues such as rape and other forms of gender-based violence).

adequately address FGM claims, the following section will now briefly address the theory of therapeutic jurisprudence underpinning the specialised domestic violence courts.

C. An Alternative Approach: Therapeutic Jurisprudence

Therapeutic jurisprudence has been described as being that philosophy of law which highlights the healing power of law as a social force rather than its harsh retributive power.⁵⁶ It asks us to envision law as an instrument of healing and rehabilitation, and to examine on this dimension rules of law, legal processes, and the roles played by those who apply the law. It focuses on the law's impact on emotional life and psychological well-being of individuals who are to be governed by any law(s).⁵⁷ Violence against women is prevalent and despite the existence of international, regional and domestic laws protecting women, laws inherent positive aims have failed due to a failure in proper understanding of the same by legal actors including the courts. In many occasions, female victims may face discrimination due to the bad drafting of laws. In such cases, the law as a social force, becomes a tool for social and legal oppression and becomes anti-therapeutic. However, according to Halder & Jaishankar, in many cases laws positive values were highlighted by the courts and legal representatives, and became a therapeutic

⁵⁶ Halder D & Jaishankar K, "*Therapeutic Jurisprudence and Overcoming Violence against Women*", IGI Global: United States, (2017), at xviii. *See also*, Kaye, *supra* note 35, at 854; Tsai, *supra* note 4, at 1294. *See also*, Stolle *et al*, "*Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*" 34 California Western Law Review 15, (1997), at 17. The therapeutic jurisprudence perspective has recently been applied in the contexts of criminal law, family law, juvenile law, disability law, discrimination law, health law, evidence law, tort law, contracts and commercial law, labor arbitration, worker's compensation law, probate law and legal profession. And, most recently, there is growing interest in a dimension of therapeutic jurisprudence that takes the law as given and explores ways in which existing law might be most therapeutically applied). *See*, Winick B, "*The Jurisprudence of Therapeutic Jurisprudence*" 3 Psychology Public Policy and Law 184, (1997), at 201-3; Finkelman D & Grisso T, "*Therapeutic Jurisprudence: From Idea to Application*", 20 New England Journal on Criminal and Civil Confinement 243, (1994). *See further*, Winick B, "*Therapeutic Jurisprudence and Problem Solving Courts*", 30 Fordham Urban Law Journal 1055, (2003), at 1064-6 (noting that therapeutic jurisprudence utilizes insights from psychology and behavioural sciences to critique legal and judicial practices. It is an approach aimed at integrating treatment services with judicial case processing; providing ongoing judicial intervention; and facilitating collaboration with community-based and governmental organisations). *See also*, Shaffer, *supra* note 24, at 989.

⁵⁷ Halder & Jaishankar, *supra* note 56, at xviii.

tool for healing the harms suffered by women.⁵⁸ Domestic violence laws and the specialised courts are a prime example of this.⁵⁹

The therapeutic approach taken by the specialised domestic violence courts focuses on perpetrator treatment and rehabilitation,⁶⁰ and more importantly for the purposes of the thesis, victim safety and support.⁶¹ It has been recognised that violence disrupts the emotional equilibrium of the victim producing feelings of anxiety, fear, depression, humiliation, anger, powerlessness, and betrayal. Intimate violence, like domestic violence and FGM, when perpetrated/ commissioned by a family member or partner, can heighten these feelings and shatter a victim's sense of trust and willingness to have close relations in the future.⁶² Some victims of crime, especially if of a repetitive nature, develop a form of learned helplessness and many suffer from a PTSD.⁶³

The specialised domestic violence courts focus on providing information and reassurances that can help to restore a sense of security within the victim. Victims need to have the opportunity to tell their story to an impartial and informed decision-maker. All of those within the criminal justice process, with whom the victim will encounter, receive training to sensitize them to these needs and how to meet them.⁶⁴ Consequently the specialised domestic violence courts, as the following section will examine, offer a gender-sensitive and victim-orientated approach to domestic violence from start to finish, which the RDP can learn from.

II. Domestic Violence Court Programmes

⁵⁸ *Ibid.*

⁵⁹ For information on therapeutic courts, including drug, mental health courts *see generally*, Strauss L, "US Drug Court: A Building Block for Canada" 8 ILSA Journal of International and Comparative Law 685, (2002); Kondo L, "Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders", 24 Seattle University Law Review 373, (2000); & Yates R, "A brief moment of glory: the impact of the therapeutic community movement on the drug treatment systems in the UK", 12 International Journal of Social Welfare 239, (2003).

⁶⁰ Tsai, *supra* note 4, at 1295-6. *See also*, Gould P & Murrell P, "Therapeutic Jurisprudence and Cognitive Complexity: An Overview", 29 Fordham Urban Law Journal 2117, (2002), at 2120-22.

⁶¹ Winick B, "Therapeutic Jurisprudence and Victims of Crime" (2008), at 2. This article is available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102350 (last accessed 29/7/17).

⁶² *Ibid*, at 3.

⁶³ Herman J.L., "Trauma and recovery", Basic Books: New York, (1997); McGruder-Johnson *et al*, "Interpersonal violence and post-traumatic symptomatology: The effects of ethnicity, gender and exposure to violent events" 15 Journal of Interpersonal Violence 206, (2000), at 206-16.

⁶⁴ Winick, "Therapeutic Jurisprudence and Victims of Crime", *supra* note 61, at 4.

The existing specialised domestic violence courts and model programmes single out domestic violence cases for specialised attention with numerous parties, dedicated to addressing the plethora of social, legal and psychological aspects of domestic violence.⁶⁵ This response by deviating from the traditional approach reinforces the prevailing belief that an interdisciplinary response is critical to addressing the various social and health issues, such as the effects on children, family, finances and psychological functioning, which are integral aspects of domestic violence.⁶⁶ In order to highlight the successful aspects of these specialised courts and potential elements, which may enhance the RDP by prioritizing and adequately addressing gender-based claims, including FGM, a number of courts and programmes implemented within the respective case-studies will now be examined. Whilst the criminal justice system ultimately aims to hold perpetrators accountable, and the RDP, focuses primarily on the protection of the victim from further persecution, the perpetrators of FGM are therefore beyond the scope of the refugee process. For this reason, the focus of the following section as stated in Section I will be on the protective functions of these courts for the victim and how that shift in attitudes and practices might be replicated or mirrored in some shape or form within the RDP. Where appropriate, however, reference (albeit succinct) will be made to perpetrator programmes particularly in instances where victim participation and co-operation is an element of the process.

A. US

1. Quincy, Massachusetts⁶⁷

⁶⁵ Tsai, *supra* note 4, at 1296-7.

⁶⁶ *Ibid*, at 1927.

⁶⁷ Director and Special Prosecutor Sarah Buel, a formerly battered woman, was instrumental in developing the Quincy court-based domestic violence programme. *See*, Fechter M, “Zero Tolerance; Stop Domestic Violence” Tampa Tribune, November 28th 1994, Baylife at 1 (as cited in Tsai, *supra* note 4, at 1297, note 92).

The Quincy programme, which began in 1976⁶⁸ and remains one of the US's most successful domestic violence intervention models,⁶⁹ rests on three fundamental concepts: integration, communication, and prioritization of domestic violence issues.⁷⁰ The continued success of Quincy's coordinated response is based on cooperation among interested parties to provide, a powerful and coordinated judicial response to domestic violence.⁷¹ The programme further prioritises domestic violence by using an approach which accomplishes the goals of controlling the perpetrator and empowering the victim.⁷² Whilst perpetrators are subject to a number of sanctions,⁷³ victims enjoy a 'user friendly' process made easier by the witness/victim advocates available and greater availability of support resources.⁷⁴

The programme is thus designed to afford victims a speedy and supportive procedural response to their cases. When a victim seeks protection, usually in the form of a Protection Order, her initial contact at the Quincy District Court will be with a domestic abuse clerk in the Restraining Orders Office.⁷⁵ The Quincy Court provides full-time, specialised advocacy to women seeking protection orders.⁷⁶ The importance of the domestic abuse clerks cannot be overemphasized. A victim entering the court is often confused, scared,

⁶⁸ "Although the various components of the Quincy programme developed over time, the first domestic violence training sessions were conducted in 1976". Tsai, *supra* note 4, at 1297, note 93. *See also*, Salzman E, "The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention", 74 Boston University Law Review 329, (1994), at 338-9 & note 57 (analysing the Quincy programme and citing it as a strong foundation for future domestic violence programmes).

⁶⁹ *See*, Fechter, *supra* note 67 (describing a Tampa campaign against domestic violence that borrows ideas from the Quincy programme); *Report on Domestic Violence: A Commitment to Action*, 28 New England Law Review 313, (1993), at 336-7. (Hereafter referred to as the Domestic Violence Report). The Domestic Violence Advisory Committee of the National Council of Juvenile and Family Court Judges rated the Quincy programme among the top fifteen of its kind in the US. *See*, Domestic Violence Report, *ibid.*, at 358.

⁷⁰ *See*, Domestic Violence Report, *supra* note 69, at 317 & 320. "The importance of the implementation of an integrated response to combat domestic violence cannot be overstated.... What is needed is the political and institutional will and commitment to make domestic violence a priority, and to send a strong and consistent message to all citizens that domestic violence is a crime and that no one deserves to be abused". Negri G, "Commission Is Formed to Develop Policies on Domestic Violence", Boston Globe, Aug. 20, 1993, at 25 (stating that Lieutenant Governor Paul Cellucci called for an "integrated, inclusive approach to the problem").

⁷¹ *See*, Domestic Violence Report, *supra* note 69, at 337 & 359. *See also*, Salzman, *supra* note 68, at 339.

⁷² Tsai, *supra* note 4, at 1298.

⁷³ Including aggressive prosecutorial tactics, greater monitoring of behaviour and a general emphasis on improved enforcement strategies. *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Salzman, *supra* note 68, at 340.

⁷⁶ *Ibid.*

and uncertain.⁷⁷ The clerks within the confines of a private office, help to provide the security a woman needs to embark on the intimidating process of requesting a restraining order.⁷⁸ No such advice or support exists within the RDP.

After the initial intake procedure, clerks refer the victim to the daily briefing sessions hosted by the District Attorney's Office⁷⁹ where they then receive information about referral services and their legal rights, but they also receive emotional support. After the briefing, a clerk accompanies the victim to the courtroom for their emergency hearing, which is usually conducted *ex parte*, without the perpetrator or his counsel present. Often the clerk will stand with the woman before the bench to provide moral support.⁸⁰ Clerks are able to dispel a woman's misconceptions about the order's efficacy and provide her with information that can increase her safety. The clerks can also assure the woman that the abuse was not her fault.⁸¹ As the programme has established 'fast track' procedures for judges to expedite domestic violence hearings⁸², Quincy has established daily morning and afternoon sessions to handle Protective Order requests exclusively.⁸³ This contrasts sharply with many area courts in which women must wait hours for an available judge.⁸⁴

The District Attorney's Office also utilizes victim/witness advocates as part of their domestic violence staff in both civil and criminal matters. The Office has full-time domestic violence staff, victim/witness advocates, two special domestic violence prosecutors, and numerous volunteer interns who assist in the functioning of the

⁷⁷ Domestic Violence Report, *supra* note 69, at 333 (stating that going through the criminal justice system may be a confusing and overwhelming experience, especially for victims of abuse who must face their abusers in court).

⁷⁸ *Ibid*, "The Attorney General's report notes that "without the assistance of qualified, trained, and supervised domestic violence advocates, many victims will not go through the process of filing petitions in court, and they and their children will remain in dangerous situations." *Ibid*.

⁷⁹ Salzman, *supra* note 68, at 341.

⁸⁰ *Ibid*, at 341-2. Many of the domestic abuse clerks in Quincy are volunteer interns from law schools and social work programmes at local universities. Their duties include disseminating: a sheet listing the critical information the woman should provide to the assisting clerk; a sheet detailing procedures on how to file a drug/alcohol petition; and an informational brochure entitled "Help and Protection for Families Experiencing Violence in the Home", which includes a list of emergency resources. *Ibid*, at 341, notes 65-67.

⁸¹ Salzman, *supra* note 68, notes 6-11 (discussing battered women's syndrome).

⁸² The Massachusetts Attorney General reiterates that criminal justice systems should make all efforts to expedite the processing of domestic violence cases, including the prompt issuance of restraining orders and warrants. Domestic Violence Report, *supra* note 69, at 315-6.

⁸³ Salzman, *supra* note 68, at 343.

⁸⁴ *Ibid*.

programmes operation.⁸⁵ Significantly, domestic violence staff provide twenty hours of training to the Quincy Police Department each year.⁸⁶ The Office trains officers on the correct procedures for incident report writing, disturbance investigation, and evidence collection.⁸⁷ This is especially important as it means that when the police record incriminating evidence, the District Attorney's Office can prosecute, or 'go forward,' without the victim's participation.⁸⁸ The Quincy programme also uses an innovative 'tracking system' in which they report domestic violence to the District Attorney's office.⁸⁹ This information according to Tsai, allows victim/witness advocates to become aware of the situation in advance and adopt a proactive approach by contacting victims to invite them to briefing sessions about protective orders, even before there is any court involvement.⁹⁰

The Quincy Probation Department's role in domestic violence cases involves monitoring perpetrator behaviour. Non-attendance at intervention programmes⁹¹ or indications of future violence against a spouse or partner result in warnings to both the victim and the police.⁹² Unsurprisingly, perpetrator programmes cannot be directly transposed into the RDP, as the aim of the process is not to hold States to account but rather to internationalize human rights norms by providing international protection when a country does not adequately protect the human rights of its citizens.⁹³ Rather, the ethos of accountability can be transposed. If reliable and current COI was available and utilised in a gender-sensitive manner, arguably, the ability to identify which countries either condone or cannot protect women from FGM and other forms of discrimination would in a similar fashion to police domestic violence warnings, caution refugee decision-makers

⁸⁵ *Ibid*, at 344.

⁸⁶ Some of the topics of these training sessions include: police responsibility, the battered women's syndrome and obstacles to leaving an abusive relationship, the role of alcohol, information on shelters and perpetrator counselling, and instruction on properly completing incidents reports.

⁸⁷ Salzman, *supra* note 68, at 345.

⁸⁸ *Ibid*.

⁸⁹ This tracking system includes computerized records that provide police officers with information about prior arrests, protective orders, and potential weapons, thus preparing them before they arrive on the scene. Salzman, *supra* note 68, at 350.

⁹⁰ *Ibid*, at 345-6. *See also*, Tsai, *supra* note 4, at 1300.

⁹¹ Salzman, *supra* note 68, at 348-9.

⁹² *Ibid*, at 349.

⁹³ McCabe E, "The Inadequacy of International Human Rights Law to Protect the Rights of Women as Illustrated by the Crisis in Afghanistan", 5 UCLA Journal of International Law & Foreign Affairs 422, (2001), at 446.

to be more aware of the situation of women within their countries of origin, the likelihood of future or further violence and the resulting complications of FGM which may affect their testimony during the RDP.

2. Dade County, Florida

The Dade County Domestic Violence Court⁹⁴ subscribes to the therapeutic jurisprudence model⁹⁵ and exemplifies a comprehensive interdisciplinary system of handling and addressing domestic violence cases.⁹⁶ The court utilises a comprehensive integrated approach⁹⁷ which contributes to the, “comprehensive provision of services by supplying a single forum within which both criminal and civil matters can be addressed”.⁹⁸ To establish an effective response to domestic violence, the DCDVC was designed around three central principles: (1) judicial activism in the community, (2) perpetrator treatment; and (3) victim services.⁹⁹

Members of the DCDVC led by the judiciary, work together as a team toward a shared goal of reducing domestic violence. Family violence training within the DCDVC is mandatory for judges, prosecutors and public defenders.¹⁰⁰ Fagan argues that the role of “judge as teacher” in the courtroom is tested, and judges have a responsibility to make public appearances at community meetings and in the popular media and to educate the public about the court and about domestic violence.¹⁰¹

⁹⁴ Hereafter referred to as DCDVC.

⁹⁵ See, Part I. C for a discussion of therapeutic jurisprudence.

⁹⁶ Tsai, *supra* note 4, at 1302. See also, Fagan, *supra* note 13, at 21 (stating that DCDVC represents an innovative, interdisciplinary, and integrated system-wide approach of a team of criminal justice system professionals to the treatment of domestic violence misdemeanour cases, civil protection orders, and violation of civil protection order cases).

⁹⁷ Dade County was the first of three jurisdictions, including the District of Columbia and Hawaii, to integrate both civil and criminal domestic violence proceedings into a single unified court. See, Epstein, *supra* note 3, at 28 (describing new domestic violence programmes in the context of showing the disparity between recent domestic violence legislation and the enforcement responses of the prosecutors, judges, and courts).

⁹⁸ Tsai, *supra* note 4, at 1302.

⁹⁹ *Ibid.* See also, Fagan, *supra* note 13, at 21-3.

¹⁰⁰ *Ibid.*, at 22-3.

¹⁰¹ *Ibid.*, at 22.

Treatment of perpetrators is emphasized over punishment in the DCDVC¹⁰² and perpetrators are required to participate in counselling and other intervention programmes.¹⁰³ Notably, within the DCDVC there is also an emphasis on the needs of children and a mandated treatment programme which does not focus on the defendant or the victim, has been established which specifically focuses on the children who are living with and witnessing domestic violence.¹⁰⁴ Group counselling for these children is required as part of the perpetrators probation.¹⁰⁵

In a similar manner to Quincy, victim advocates within the DCDVC also address the needs of victims by assisting them in obtaining accessibility to resources and services.¹⁰⁶ Their role includes “encouraging and facilitating participation by the victim in the entire process whether by pursuing prosecution of the perpetrator or obtaining an order of protection”.¹⁰⁷ The remedies available to domestic violence victims, like FGM claimants are meaningless if they cannot access the legal system. Victim advocates trained in the law and sensitive to the needs of victims, can help to assist victims. They can prepare victims for court and provide emotional support throughout the process.¹⁰⁸ This support as will be discussed further in Chapter Five would be instrumental to victims of FGM. Advocates within the RDP, could similarly promote engagement with the RDP by tailoring their services to respond to the needs of claimants, including overcoming cultural, language and social barriers.

¹⁰² *Ibid.*

¹⁰³ In keeping with the therapeutic jurisprudence philosophy underpinning this court, all cases are monitored by the court after imposition of the sentence, and the defendant is required to return to court periodically during probation to discuss progress in counselling and compliance with the sentence. *Ibid.*

¹⁰⁴ *Ibid.* See also, Davidson H, “*The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association*”, American Bar Association, (1994), available online at <http://library.niwap.org/wp-content/uploads/2015/FAM-Tool-ImpactDVChildren-8.94.pdf> (last accessed 29/7/17). (Between 3.3 and 10 million children witness domestic abuse in their own homes each year).

¹⁰⁵ Fagan, *supra* note 13, at 22. See also, Tsai, *supra* note 4, at 1304. Children who witness domestic violence may experience ‘serious behavioural, cognitive, and affective problems’, thereby making counselling programmes particularly critical for the mental health of such children. *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association*, *supra* note 104, at 6.

¹⁰⁶ Fagan, *supra* note 13, at 23.

¹⁰⁷ *Ibid.* See also, Tsai, *supra* note 4, at 1304.

¹⁰⁸ See, Schmitz S, “*What’s the Harm?: Rethinking the Role of Domestic Violence Advocates and the Unauthorized Practice of Law*”, 10 William & Mary Journal of Women and the Law 295, (2004), at 299 (detailing the benefits of victim advocates in domestic violence cases).

3. New York City

The first Domestic Violence Court in New York State opened in Brooklyn in 1996, handling felony-level domestic violence cases.¹⁰⁹ Like the Quincy and Dade models, New York's domestic violence programme provides a comprehensive multidisciplinary approach¹¹⁰ which includes:

Specialized domestic violence courtrooms dedicated to handling only domestic violence cases. These courtrooms are staffed by specially trained judges, prosecution teams, and a team of domestic violence personnel consisting of a Resource Coordinator, a Victim Advocate, and a Defendant Monitor.¹¹¹

Victim Advocate provides support and assistance to victims throughout the court proceedings and encourages victim participation.¹¹² Services provided include the provision of information concerning court proceedings and orders of protection, and other information relating to services including counselling and social services agency referrals.¹¹³ In essence Tsai argues that the "Victim Advocate maintains up-to-date information on the status of the victim, including any violations of orders of protection that the victim reports".¹¹⁴

On the other hand, the Defendant Monitor is responsible for perpetrator status and assists in overseeing defendant compliance with court-ordered conditions, such as orders of protection and participation in counselling and substance-abuse programmes.¹¹⁵ The

¹⁰⁹ Domestic Violence Courts are currently operating in Manhattan, Brooklyn, Albany, Troy, Glens Falls, Saratoga Springs, Syracuse, Binghamton, Auburn, Buffalo, Clarkstown, Spring Valley, Westchester, Queens, Bronx, and Erie, Nassau, and Suffolk Counties. Courts are also being planned in several other jurisdictions in New York State. See, New York State Division of Criminal Justice Services, "New York State Domestic Violence Courts Programme Fact Sheet" (2001), available online at <http://www.criminaljustice.ny.gov/ofpa/domviolcrtfactsheet.htm> (last accessed 24/6/17). For a detail discussion of the New York Domestic Violence Court see, Koshan J, "Investigating Integrated Domestic Violence Courts: Lessons from New York", 51 Osgoode Hall Law Journal 989, (2014).

¹¹⁰ Tsai, *supra* note 4, at 1300.

¹¹¹ *Ibid*, (citing *The Criminal Court of the City of New York, Domestic Violence Intervention Plan*, (1997), at 5-9).

¹¹² *Ibid*, at 8-9.

¹¹³ *The Criminal Court of the City of New York, Domestic Violence Intervention Plan*, *supra* note 111 at 8. See also, Tsai, *supra* note 4, at 1300.

¹¹⁴ *Ibid*.

¹¹⁵ *The Criminal Court of the City of New York, Domestic Violence Intervention Plan*, *supra* note 111, at 9.

Resource Coordinator, acting as a conduit of information for the judge, obtains victim status and defendant compliance information directly from both the Victim Advocates and the Defendant Monitors.¹¹⁶ Such cooperation is imperative for if an emergency situation arose, this network of information ensures that judges are fully aware of the situation as quickly as possible, thus ensuring a rapid response and more stringent enforcement of sanctions.¹¹⁷

The court has also developed a Domestic Violence Intervention Plan which provides for three types of dedicated parts in each county: Domestic Violence All-Purpose Parts to handle all post-arraignment proceedings, Domestic Violence Trial Parts to expedite the hearing of trial ready cases, and Domestic Violence Compliance Parts to monitor defendants' compliance with court-ordered conditions of sentence.¹¹⁸ The use of such plans are critical as they reinforce the idea that interested parties understand how to respond to and deal with the complexities associated with domestic violence. It further reinforces the need for effective assessment, intervention, documentation and referral where necessary. Similar plans could arguably work within the RDP. Effective assessment could help to assess the needs of FGM claimants and determine early what resources (if any), are required which could make the RDP more accommodating. Equally, the identification of needs would afford decision-makers time and resources to implement the gender guidelines, make claimants aware of the process, and source necessary COI and other required evidence. By supporting claimants and providing information about resources and options, decision-makers would give claimants the opportunity to have their claims heard in a gender-sensitive process.

Another important aspect of New York City's coordinated community response to domestic violence is the role and use of Information Technology. New York State has

¹¹⁶ *Ibid*, at 7.

¹¹⁷ Tsai, *supra* note 4, at 1301.

¹¹⁸ See, "Criminal Justice" (2000), available online at <http://www.nycourts.gov/admin/stateofjudiciary/stofjud9/4%20criminal.pdf> (last accessed 5/7/17). Once a case has been seen by a judge in the All-Purpose Part, it can either go to trial or it may be disposed of through a plea. The case then goes to either the Domestic Violence Trial Part or the Domestic Violence Compliance Part. The dedicated Trial Part ensures that the system will give priority to domestic violence cases which are ready for trial in order to dispose of them quickly. See, Tsai, *supra* note 4, at 1301. The Compliance Part also monitors attendance in court-mandated intervention programmes. Non-compliance with these programmes may result in a referral to the All-Purpose part for more stern sanctions, such as the imposition of a custodial sentence. *Ibid*, at 1301, note 124.

developed the Domestic Violence Court Technology Application and Resource Link,¹¹⁹ a software application that uses internet technology to connect domestic violence courts with law enforcement and social service providers. This innovative technology facilitates the transfer of critical information between the court and a variety of other agencies involved in domestic violence cases. Similar software and innovations would be instrumental within the refugee process in respects of obtaining COI.

4. District of Columbia

Like the DCDVC, the District of Columbia, incorporates both criminal and civil domestic violence cases into a unified/integrated court system.¹²⁰ The system comprises of a Domestic Violence Intake Centre, a Domestic Violence Coordination Unit, and a Domestic Violence Court.¹²¹

The Domestic Violence Intake Centre is the initial point of contact for victims. Here they meet with a Civil Intake Counsellor to discuss the protection order process and obtain assistance with paperwork and additional advocacy services as required.¹²² Additional services provided by the Civil Intake Counsellor, includes; child support, custody, or visitation issues as part of an order of protection.¹²³ At this stage in the process, a victim may speak with a Victims Advocate from the Attorney's Office regarding pending, or potential criminal matters.¹²⁴

¹¹⁹ See, Young P, *An Informed Response: An Overview of the Domestic Violence Court Technology and Resource Link*, Centre for Court Innovation, (2001), available online at http://www.courtinnovation.org/pdf/info_response.pdf (last accessed 5/7/17). This new link, "Allows users, which include judges, attorneys, victim advocates and batterers' intervention programs—to share information instantaneously. The application immediately notifies courtroom staff when an order for protection has been formally violated. Attorneys and victim advocates are able to provide court players with up-to-date information about their clients. The goal is to promote greater coordination and to help improve the criminal justice system's response to domestic violence crime". *Ibid*.

¹²⁰ See, Epstein, *supra* note 3, at 28. Although Dade County was the first jurisdiction to combine civil and criminal domestic violence cases, its court does not have the capacity to handle issues of child custody, visitation, and support. *Ibid*, note 140. The District of Columbia is able to handle such issues. *Ibid*, at 28, note 140.

¹²¹ *Ibid*, at 29-33.

¹²² *Ibid*, at 30. See also, Tsai, *supra* note 4, at 1305.

¹²³ *Ibid*. See also, Epstein, *supra* note 3, at 30. The Intake Centre also houses advocates from the D.C. Coalition Against Domestic Violence who are available to provide women with referrals to counselling programmes, shelters, or other social service agencies. *Ibid*.

¹²⁴ Tsai, *supra* note 4, at 1305.

Next, a victim will go to the Domestic Violence Coordination Unit where specially trained domestic violence clerk's performs the administrative role of scheduling necessary hearings and compiling case histories.¹²⁵ This step is crucial as the clerks ensure a comprehensive response by searching the computer database for any prior or additional cases involving the same parties. In this way, judges are made aware of the history of the case enabling them to make a more informed decision.¹²⁶

The Domestic Violence Court only hears domestic violence cases and is staffed by specially trained judges assigned to serve a full year in the Court before rotating out.¹²⁷ Judges, their officers and clerks receive training on domestic violence issues before commencing any assignments. Training sessions and written materials dispel the myths surrounding domestic violence and address special issues and applicable law relating to immigrants and non-English speaking parties.¹²⁸ Furthermore, as part of the coordinated community response, judges participate in biweekly interdisciplinary meetings with other organisations to discuss problems that arise and to identify methods for improving the programme.¹²⁹ As discussed in Chapter Three many decision-makers who listen to horrific stories of violence suffer from vicarious traumatization, and whilst they may empathize with the claimant they cannot use the defences of avoidance or denial to protect themselves against the images associated with the claim which has been made. Overexposure to these types of accounts often triggers defensive reactions that lead to trivialization of horror, cynicism, and a lack of empathy¹³⁰ among decision-makers. Studies have indicated that in such instances decision-makers have displayed direct avoidance and denial, through refusal to hear the claim or a focus on peripheral events/neutral information while ignoring the traumatic event, followed by a rejection of the claimants testimony based on a lack of credibility.¹³¹ If decision-makers, like the judges in the District of Columbia domestic violence court were trained prior to taking up

¹²⁵ Epstein, *supra* note 3, at 31-2.

¹²⁶ Tsai, *supra* note 4, at 1305.

¹²⁷ Epstein, *supra* note 3, at 33.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Rousseau C *et al*, "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" 15 *Journal of Refugee Studies* 43, (2002), at 49.

¹³¹ *Ibid.*, at 55 & 59.

FGM and other gender-based claims and were rotated on a regular basis then the possibility of vicarious traumatization and the denials associated with this disorder developing would be potentially reduced and possibly go some way in helping to reduce disparate decision-making.

The District of Columbia court system, like its counterparts utilises extensive advocacy and support services for victims of domestic violence, but focuses less on defendant monitoring and services to children. All four however promote a comprehensive community response to domestic violence which “integrates multiple services into a single court-based system”.¹³² The examination of these innovative courts thus far has identified a number of elements which could easily be transposed into the RDP. However, before exploring these best practices/potential reforms in any detail, the specialised domestic violence courts and programmes implemented throughout the UK and Canada will now be examined to see what other (if any) positive elements can be utilised and subsequently implemented within the RDP.

B. Canada

Canada has several well-established specialised domestic violence courts¹³³ which are almost exclusively criminal law courts.¹³⁴ Dedicated domestic violence courts have been established in many provinces including: Manitoba, Ontario, Yukon, Alberta, Saskatchewan and New Brunswick.¹³⁵ Although these courts all vary the goals are generally to expedite court process, increase victim cooperation and hold perpetrators accountable. Significantly, these courts all have designated and specially trained Crown prosecutors and victim/witness assistance staff.

¹³² Tsai, *supra* note 4, at 1306.

¹³³ For an overview see, Tutty L, Ursel J & Douglas F, “*Specialized Domestic Violence Courts: A Comparison of Models’ What’s Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada*”, Cormorant Books: Toronto (2008).

¹³⁴ Koshan, *supra* note 109, at 1000.

¹³⁵ See, Tompson E, “*What’s the holdup?*”, Legal Report: Family Law (2012), available online via the Canadian Lawyer website at <http://www.canadianlawyermag.com/4259/What-s-the-holdup.html> (last accessed 2/7/17) & Response of the Government of Canada to the questionnaire on violence against women, 2008, available online at <http://evaw-global-database.unwomen.org/en/countries/americas/canada/1990/dedicated-domestic-violence-courts> (last accessed 1/7/17).

1. The Family Violence Court of Winnipeg, Manitoba.

In 1990 Manitoba established the first specialised family violence court in Winnipeg.¹³⁶ The five components of the court are: (1) a “zero-tolerance” pro-arrest policy; (2) a women’s advocacy and child victim/witness programmes for victims of family violence; (3) a specialised prosecutorial unit of Crown Prosecutors; (4) specially designed courtrooms and dockets for intake, screening court and trials; and (5) a special probation unit to deliver court/mandated treatment programmes.¹³⁷ The three goals of the court are to expedite court processing, to increase victim co-operation and reduce case attrition, and to provide appropriate sentencing that would protect victims, such as treatment for abusers and offender monitoring through probation supervision.¹³⁸

This new court process required a cultural and social change in participants and workers involved with the Court in an environment of a creative response to challenges. Whilst some may argue that such changes have already occurred within the RDP with the gender-guidelines being a direct product, such arguments are redundant. Whilst the guidelines represent a step in the right direction, their limitations coupled with the evident biases of decision-makers render them ineffective. Thus, a cultural and social change in participants is also required within the RDP to ensure that FGM claimants are no longer discriminated against and incorrectly denied protection because the non-binding nature of the guidelines and the social and cultural insensitivity of decision-makers.

The court process operates a mandatory arrest policy where there was evidence of a crime irrespective of whether the victim wanted to press charges with a specialised prosecution team which, “attains a higher conviction rate than similar offences prosecuted

¹³⁶ Hereafter referred to as the Winnipeg Court. The Court handles first appearances, remands, guilty pleas and trials for spousal abuse, child abuse and elder abuse cases. For a comprehensive overview of the Winnipeg Court please refer to the following: Justice Lea Duval, “*A Judicial Perspective on Manitoba’s Specialized Family Violence Court*”, June (2005), available online at <http://domesticpeace.ca/images/uploads/documents/ManitobaDVCJudicialPerspective2005.pdf> (last accessed 24/6/17); Ursel J, “*The Family Violence Court of Winnipeg*” 21 *University of Manitoba Law Journal* 100, (1992).

¹³⁷ See, *Final Report of the ad hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation*, Department of Justice Canada, (2009), at 40. This report is available online at http://justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/spo_e-con_a.pdf (last accessed 29/7/17).

¹³⁸ *Ibid*, at 40-41.

in other settings in Canada”.¹³⁹ Protection Orders also seek to achieve the immediate safety of victims which remains the primary focus of the Winnipeg court throughout the process. Within the Winnipeg Court there is also a policy of rigorous prosecution of perpetrators without re-victimising the victim.¹⁴⁰ This is achieved primarily by the “accompanying massive increase in funding of victim support services”.¹⁴¹ Orders for criminal offenders focus on treatment and Corrections has developed specialised programmes in the community and prison system.¹⁴²

The Winnipeg Court was and continues to be an innovative experiment in securing justice for victims of domestic violence.¹⁴³ It emphasised prosecutorial and law enforcement interventions, including mandatory arrest policies. It also focused on victim safety and the accountability of perpetrators. Thus, it has laid the foundations for the establishment of other such courts and programmes throughout Canada, which considering modern research have given further priority to the needs of victims by promoting victim advocacy and protection.

2. K Court: Ontario’s Domestic Violence Justice Strategy¹⁴⁴

The DVJS aimed to “establish a more coordinated and integrated response to domestic violence by the justice system”.¹⁴⁵ The DVJS is led by the Ministry of the Solicitor General and the Ministry of the Attorney General and involves the Ministry of Community Safety and Correctional Services, the Ministry of Citizenship and

¹³⁹ Hennessy A.M., “*Specialist Domestic and Family Violence Courts: The Rockhampton Experiment*” (2008), at 3, available online at <http://archive.sclqld.org.au/judgepub/2008/Hennessy160608.pdf> (last accessed 2/7/17).

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Domestic homicide rates reduced significantly as a result of the court initiative, there has also been a reduction in recidivism and earlier and more frequent reporting of violent offenders to Police (twice the national average), leading to more arrests. *See*, Ursel J, “*Winnipeg Family Violence Court*”, presentation as AIJI Family Violence Conference in Adelaide in February 2006, as cited in Hennessy, *supra* note 139, at 15.

¹⁴⁴ Hereafter referred to as the DVJS.

¹⁴⁵ Ministry of the Attorney General, “*Implementing the Specialized Domestic Violence Court Process*”, Ontario, Canada: Ministry of the Attorney General, (2000), at 1-4.

Immigration and the Ontario Women's Directorate.¹⁴⁶ The objectives of the DVJS are: (1) to intervene early in domestic violence situations; (2) effectively prosecute domestic violence cases; (3) provide support to victims; and (4) hold offenders accountable.¹⁴⁷ To meet those objectives the elements of the DVJS include: local justice community co-ordination; enhanced investigation by trained police officers; co-ordinated prosecution led by trained Crown attorneys; fast tracking of cases; victim support; and Partner Assault Response Programmes.¹⁴⁸ The overriding goal is to send out a consistent message that domestic violence will not be tolerated by the courts or the community at large.

Significantly, Ontario has committed to all its fifty-four court jurisdictions having either a specialised domestic violence court with dedicated staff or a specialised process for handling such cases. The key to achieving this objective is collaboration and a commitment to making the process work. Depending on each jurisdiction, an early intervention model and/or a co-ordinated prosecution will be implemented across Ontario. These two distinct models were piloted in Ontario in early 1997: the early intervention model in North York and the co-ordinated prosecution model in Toronto. Approximately twenty courts have implemented a specialised domestic violence court process.¹⁴⁹ In general, combinations of both models have been used throughout Ontario, with the volume of cases and the size of the jurisdiction steering the approach implemented.¹⁵⁰ One of the most successful Ontario courts to date is K Court.¹⁵¹

¹⁴⁶ Ontario introduced this strategy in response to the May-Iles Inquest and the 1999 Joint Committee on Domestic Violence recommendations, the Spring 1999 Throne speech that made a commitment to prosecute crime and support victims and the Blueprint commitment for action on Domestic Violence. *See*, Eley S, "Changing Practices: The Specialized Domestic Violence Court Process", 44 *The Howard Journal* 113, (2005), at 115.

¹⁴⁷ Ministry of the Attorney General, "Implementing the Specialized Domestic Violence Court Process", *supra* note 145, at 4-1.

¹⁴⁸ Eley, *supra* note 146, at 115.

¹⁴⁹ Eley, *supra* note 146, at 116.

¹⁵⁰ It is important to note that within the Canadian context, there are two types of specialised courts. One is a plea court which does not handle any criminal trials, but deals only with cases where the offender is prepared to plead guilty to the offence. The other, such as K Court handles domestic violence cases which involves a full criminal trial. For further information on both these types of courts *see*, Hubbard D, "Domestic Violence Courts in Canada: A Special Solution", Legal Assistance Centre (2000), at 1. This document is available online at <http://www.lac.org.na/news/inthenews/pdf/dvincanada.pdf> (last accessed 30/6/17).

¹⁵¹ The court is named after the letter which is marked on the dockets of all domestic violence cases to distinguish them from other forms of violence.

K-Court which began operation in 1997 aims to provide a, “vigorous prosecution of domestic violence cases, compared to other courts across Ontario”.¹⁵² The court is presided over by judges assigned in rotation for one week each month for a period of approximately three months. The benefits of the rotation of judges include:

preventing the association of a specific judicial leader in the prosecution of domestic violence cases, engaging the same K Court judge for the length of any one case and ensuring the case is confined to K Court, and allowing K Court judges to deal with cases other than domestic violence during each month.¹⁵³

Rotation as already discussed can reduce the likelihood of vicarious traumatization among decision-makers occurring. It can also ensure that wrongful denials will be easier to detect and remedy, especially in instances where the same decision-maker is continually making such determinations. Furthermore, the regular rotation of judges also allows them to gain experience of dealing with complex domestic violence cases. Situated within the Provincial Court in Ontario, all trials are heard by a judge. The main stakeholders of K-Court include Crown attorneys, victim/witness Assistance Programme, Cultural Interpreter Services, the police, Partner Assault Response Programmes, and the parole and probation services.¹⁵⁴

The co-ordinated prosecution stream in K-Court emphasises, the gathering of solid evidence to support a vigorous prosecution.¹⁵⁵ Compared to the practices associated with domestic violence cases in other criminal courts, key actors felt that the police response with practices relating to the collection of corroborating evidence, was vital in ‘front end loading’ towards ‘successful’ prosecution. According to one police representative, “K Court is the aggressive prosecution model, where the police are specially trained to go beyond what they were doing previously in these matters”.¹⁵⁶

An important backdrop to the establishment of the specialised court was a new police policy adopted because so many cases of domestic violence were being withdrawn by

¹⁵² Eley, *supra* note 146, at 116.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ See, Brown T, “*Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Response*”, Canada: Department of Justice Canada, (2000).

¹⁵⁶ Comment made by a police representative, as cited in Eley, *supra* note 146, at 117.

victims. In terms of the new police approach, the responsibility for laying charges rests entirely with the police, who are not even supposed to ask the victim if she wishes to press charges. And the police *must* lay charges in the case whenever there are reasonable grounds for believing that a violent offence has been committed.¹⁵⁷ Once a charge is laid only a Crown attorney can withdraw it and only in limited circumstances. In cases where police officers are called, and a charge is laid, the Detective Sergeant will act as a liaison officer for K-Court and lead the investigation unit. In addition, K-Court also uses a Specialised Police Reporting Form for domestic violence cases. This form includes more detail than ordinary police reporting forms and was designed to guide the investigating officer in carefully collecting all available evidence.¹⁵⁸ This evidence is supplemented by medical records, police photographs of the crime scene and the victim's injuries, and statements taken from any witnesses to the crime. The investigation unit then checks for prior charges and a conviction history of the accused. The result of this has been that "more evidence has been gathered by the police, the quality of police investigations has improved, and case processing times have decreased significantly".¹⁵⁹ Whilst this aspect of the domestic violence court is not pertinent in the sense that we are not concerned with perpetrator accountability, the RDP can nevertheless learn from how the court collects and utilises evidence.

In K-Court, four full-time Crown attorneys are assigned at any one time and make case screening decisions for the court. Crown attorneys are all specially trained in the issue of domestic violence and they have chosen to specifically do this work.¹⁶⁰ Consequently, cases are handled from start to finish by the same prosecutor who is assigned to the case early in the process and offers the victim greater continuity.¹⁶¹ A

¹⁵⁷ Hubbard, *supra* note 150, at 2.

¹⁵⁸ For example, police are required to produce tape recordings of the telephone call from the victim to the police where possible. They are also expected to make a video or audio tape-recording of their interview with the victim immediately after the incident, which could later be used as evidence in the court cases.

¹⁵⁹ See, Eley, *supra* note 146, at 118. See also, Moyer S *et al*, "The Evaluation of the Domestic Violence Courts: Their Functioning and Effects in the First Eighteen Months of Operation 1998-1999", Ontario Canada: Ministry of the Attorney General, (2000).

¹⁶⁰ As cited in Eley, *supra* note 146, at 118.

¹⁶¹ In fact, it has been suggested that: "They don't do any other cases, so they have the time to properly prepare. They all do the assessment. They can't meet with all the victim witnesses ahead of time and one Crown has carriage of the file so if there's disclosure problems, then they've identified matters for discussion with defence ahead of time and what the outstanding issues are going to be at trial". K-Court Representative as cited in Eley, *supra* note 146, at 118.

similar approach within the RDP would arguably, minimize intimidation and reassure FGM claimants that they are in a safe environment where they can speak freely. Such continuity increases the quality of the prosecutions, increases the likelihood that a victim will cooperate with the prosecution and improves service to the victims”.¹⁶² Confined within specialist courts, domestic violence cases are seen as higher status and of top priority requiring skilled legal advocates.

K-Court is also renowned for its victim/witness assistance programme.¹⁶³ The VWAP is funded to provide support to victims of crime, by the Ministry of the Attorney General and is separate and independent of the prosecutor’s office. As one worker at the VWAP expressed “as far as we are concerned we are crisis intervention around the court process”.¹⁶⁴ Research suggests that victims are most receptive to guidance about risk management immediately or soon after the crime.¹⁶⁵ Accordingly, to prevent withdrawal of the case at the prosecution stage and to make the victim as comfortable as possible, the victim is contacted by the VWAP and encouraged to come in for an interview where they will be given a friendly orientation to the court and the criminal justice system and referred to appropriate community agencies or services if they so wish.¹⁶⁶ Their goal is to build a strong relationship with the victim, and address their needs. According to Alderson-Gill, the VWAP can also contribute to the successful prosecution of cases by providing complainants with sufficient support so that they may be prepared to testify at trial, where they might not otherwise have been.¹⁶⁷ As previously discussed, the use of advocates

¹⁶² Dawson M & Dinovitzer R, “*Victim cooperation and the prosecution of domestic violence in a specialized court*”, 18 *Justice Quarterly* 593, (2001), at 603.

¹⁶³ Hereafter referred to as the VWAP.

¹⁶⁴ VWAP worker as cited in Eley, *supra* note 146, at 119.

¹⁶⁵ See, Friedman L.N. & Tucker S.B., “*Violence Prevention through Victim Assistance: Helping People Escape the Web of Violence*” in Davis *et al*, “*Victims of Crime*”, (2nd ED), Sage: Thousand Oaks, California, (1997).

¹⁶⁶ VWAP worker as cited in Eley, *supra* note 146, at 120 (noting “We contact our clients whom we know are going to be testifying and try and get a hold of them really early.....and connect up with them and talk to them about what kind of ongoing needs are going to be in order to kind of go through this system...basically it’s giving general information. We also do safety planning with women, draw up safety plans for them and we assess what their immediate needs are, if they need counselling, if they need their own lawyer if they have family court issues that they are worried about – custody and access, their property rights, we will certainly give them a referral, we also write letters on their behalf to housing so that they can get a priority move into a safe place, help them out with social assistance if they need that”). *Ibid.* See also, Hubbard, *supra* note 150, at 2.

¹⁶⁷ See, Alderson-Gill & Associates Consulting Inc, “*Domestic Assault Court Projects Old City Hall and North York, Evaluation Report*”, Toronto: Ministry of the Attorney General of Ontario, (1998), at 9. As in the case of the plea court, an offender who is found guilty can be sent to a 16-week perpetrator intervention

within the RDP would help FGM claimants access the resources they need to ensure that their claims are heard in a confidential and sensitive manner. They can also signpost to other agencies for help or counselling which claimants may need.

3. Saskatchewan

Domestic Violence Courts have emerged in three Saskatchewan cities: the Battlefords Domestic Violence Treatment Options Court in North Battleford, the Saskatoon Domestic Violence Court and the Regina Domestic Violence Court in Saskatoon.¹⁶⁸ Generally the goals of the courts are to: increase safety for victims of domestic violence and decrease violent behaviour by their partners; provide support for victims and programming for children who witness domestic violence; increase compliance with treatment and rehabilitation programmes; increase alternatives to incarceration, particularly for Aboriginal people; develop partnerships with treatment, social service and community agencies to address the underlying causes of criminal behaviour; and, reduce recidivism.¹⁶⁹

The Battlefords Court established in April 2003, is a sentencing court. It provides intensive support and services for victims and their families and supports offender's participation in violence prevention programming. Auxiliary to the Court are community-based programmes for children who witness domestic violence and support programmes for female victims of violence. A Steering Committee made up of representatives from government departments and community-based organizations meets regularly to provide advice and discuss issues.

programme as one component of the sentence. However, domestic violence is treated as a serious offence in this court. This fact is part of what makes the system work. Offenders must know that a string of domestic violence offences will land them in increasingly serious trouble. In this way, society sends out a message that domestic violence and abuse will simply not be tolerated. *See*, Hubbard, *supra* note 150, at 3. *See also*, Eley, *supra* note 146, at 120-21 (discussing probation and parole services in relation to K-Court).

¹⁶⁸ For an overview of the Saskatchewan Domestic Violence Courts please refer to the courts website at <http://www.sasklawcourts.ca/home/provincial-court/adult-criminal-court/domestic-court> (last accessed 30/6/17).

¹⁶⁹ *See*, Johnson H, "Measuring Violence Against Women: Statistical Trends 2006". Statistics Canada: Ottawa, (2006), at 47. This report is available online at <http://www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf> (last accessed 29/7/17).

Throughout the court case dedicated legal aid and aboriginal court workers and crown counsel are available in court for victims.¹⁷⁰ Furthermore, victims are referred to Victim Services by the court and Victim Services in turn prepares the victim for the risk assessment interview with a representative from the probation services. Preparation for victims is of the uttermost importance, as it makes the process less daunting and prepares them for the unexpected. FGM claimants, as discussed in Chapter Three, who in an unaccustomed environment, faced with cultural, societal and linguistic barriers, would benefit from the use of assistance and preparation for determination hearings. Legal representatives may not have the time to do this, so the use of victim's advocates is of vital importance in this respect. Many FGM victims have a fear of authorities¹⁷¹ and for many being questioned by a male in respects of FGM will be an extremely daunting task.¹⁷² Only through preparation, guidance and reassurances of safety and confidentiality will FGM claimants be as prepared as they can be for the process ahead.

Victim Services is funded by the Department of Justice from victim surcharges imposed by the court on all perpetrators. Contact information for the service is provided to victims by investigating officers. As Victim Services operates out of the RCMP detachment building in North Battleford it is "assessable at the time the victim attends to complete his or her statement".¹⁷³ Representatives from Victim Services provide safety planning, crisis intervention, support and court assistance to victims. Moreover the victim may be assisted with an application for an Emergency Intervention Order, or referred to appropriate agencies offering shelter and counselling services.¹⁷⁴ Of particular importance is the fact that with the permission of the victim, Victim Services maintains regular contact with the victim, "regarding file updates; assists with the completion of a victim impact statement;

¹⁷⁰ Meekma V, "Partnership Between Court and Community: The North Battleford Domestic Violence Treatment Option Court" (2006), at 5. This document is available online at http://www.erabc.ca/vm_partnership.pdf (last accessed 14/9/09).

¹⁷¹ See for instance, INS Gender Guidelines, *supra* note 49, at 4.

¹⁷² See, INS Gender Guidelines, *supra* note 49, at 5. See also, UK Gender Guidelines, *supra* note 49, section 5.30 & 5.31. The UK Asylum Policy Instruction: *Gender Issues in the Asylum Claim*, whilst acknowledging that, "Victims of sexual abuse may not feel comfortable recounting their experiences in front of relatives", do not explicitly acknowledge that such victims may equally be inhibited about disclosing details of a sexual nature to men or male interpreters. *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 49, at 12.

¹⁷³ Meekma, *supra* note 170, at 11.

¹⁷⁴ *Ibid.*

accompanies the victim to court; and will represent the victim in court and at the working committee meetings”.¹⁷⁵ Yet again, such an approach within the RDP would be advantageous as it fosters a sense continuity, support and ensures that claimants are assured of having their voices heard. For FGM claimants this is important as they need to feel confident in disclosing sensitive information which decision-makers will base their determinations on.

The Saskatoon Domestic Violence Court is a trial court which deals with domestic violence matters set for sentencing as well as those set for trial or preliminary hearing. Community components that support the Court include a victim case worker who provides services to all victims of offences and offender treatment programmes. A Steering Committee, like that used in the Battleford Court meets three times a year in an oversight role. In conjunction, the Battleford and Saskatoon Domestic Violence Court bring together social service agencies, the criminal justice system, and community agencies to provide an immediate, seamless and effective response.¹⁷⁶ A critical component of the Saskatoon Domestic Violence Court, like the Battleford Court, is the intensive support provided to victims and families through the police-based victim’s services programmes. There are approximately seventeen victim’s services programmes and six Aboriginal Resource Officer programmes serving 15,000 victims annually in Saskatoon. Through an Aboriginal Family Violence Initiative, funding is also provided to eight community-based programmes that assist urban Aboriginal families.¹⁷⁷

The commitment of Saskatoon to addressing domestic violence is further evident through the establishment of the Regina Domestic Violence Court. The Regina Court began sitting in March 2008. It strives to increase the safety of victims and provides services including referrals to counselling, crisis intervention, ongoing information about the case, and the opportunity for the victim to participate in the decisions affecting the perpetrator.¹⁷⁸ Domestic violence court case-workers also play a critical role in the Regina

¹⁷⁵ *Ibid.*

¹⁷⁶ *See*, Response of the Government of Canada to the questionnaire on violence against women, 2008, *supra* note 135.

¹⁷⁷ *Ibid.*

¹⁷⁸ Ministry of Justice and Attorney General, “*Saskatchewan: Fact Sheet Regina Domestic Violence Court*”, (2008), at 1, available online at <http://www.gov.sk.ca/adx/aspx/adxGetMedia.aspx?mediaId=448&PN=Shared> (last accessed 29/7/17).

Court process “by ensuring that each victim is supported by the same case-worker from the time of first contact with the legal system to the complete resolution of the case”.¹⁷⁹ All cases appearing before the court are reviewed by a working group consisting of representatives from Public Prosecutions, the defense bar, probation services and other agencies providing treatment programmes and victim services. The working group then recommends a course of action for each case before the court.¹⁸⁰ Approximately twenty-five partners¹⁸¹ have worked together to develop an appropriate model to meet Regina's needs. With extensive funding allocated to the courts¹⁸² for the provision of specialised court staff and Aboriginal court workers among other things, this assurance highlights not only the commitment to combat domestic violence, but more importantly for the purposes of this thesis, shows the commitment of the Saskatoon Government to make the process more accommodating for victims. Like their US counterparts, the Canadian domestic violence courts demonstrate that a strong system of services and supports to empower victims is a foundational component of societal response to domestic violence and its treatment within the court system.¹⁸³

C. UK

¹⁷⁹ *Ibid.*

¹⁸⁰ The following options are presented to the accused: (1) enter a not guilty plea and have the case set for trial in another court; (2) enter a guilty plea and receive a sentence; (3) enter a guilty plea and, if further suitability criteria is met through assessment at probation services, participate in the domestic violence court treatment option; those deemed not suitable for the treatment option will be sentenced in the regular way. *Ibid.*

¹⁸¹ These partners include: The Provincial Court, the Ministries of Justice and Attorney General, Corrections, Public Safety and Policing, and Health, the Regina Qu'Appelle Health Region, Regina Police Service, RCMP, defence bar, victim's services, Aboriginal groups and community-based organizations.

¹⁸² For instance, in the 2008/9 budget, the Government of Saskatchewan provided \$430,000 to support the implementation of the Regina Domestic Violence Court and the existing courts in North Battleford and Saskatoon. This funding provided dedicated Legal Aid and Crown counsel positions for the Regina Court and ensured that court staff and Aboriginal court workers were also available. In addition, it funded a co-ordinator to assist the work of all three courts. Additional funding to support the Regina Domestic Violence Court was provided by Justice Canada's Victims Fund, Regina United Way and the Ministries of Health and Corrections, Public Safety and Policing. See, Cook C, “*Domestic Violence Court Opens in Regina*” (2008), available online at <http://www.gov.sk.ca/news?newsId=93f36771-ef37-4ded-9c08-e193220e6353> (last accessed 29/7/17).

¹⁸³ Augusta-Scott T, Scott K & Tutty L, “*Innovations in Interventions to Address Intimate Partner Violence: Research and Practice*”, Routledge: London, (2017), at xvi.

With as many as one in ten women being the victims of domestic violence annually,¹⁸⁴ domestic violence courts are a pivotal tool in increasing the victim's sense of security and safety. Successive UK governments from 2005 to present day, have established and supported specialist domestic violence courts in England and Wales.¹⁸⁵ Inspired by the development of domestic violence courts in the US¹⁸⁶ and elsewhere,¹⁸⁷ an SDVC programme was established in 2005¹⁸⁸ based on eleven core components in England and Wales. SDVCs set out to increase the number and speed of convictions of domestic violence, and to increase victim satisfaction and their feelings of safety. By December 2013, there were 138 officially accredited SDVCs¹⁸⁹ across the country, (with other courts operating SDVC-like processes but without official accreditation).¹⁹⁰ These courts, like their American and Canadian counterparts, represent a partnership approach to domestic violence by the police, prosecutors, court staff, the probation service and specialist support services for victims. Magistrates sitting in these courts are fully aware of this approach and have received additional training. These court systems provide a specialised way of dealing with domestic violence cases in magistrates' courts. They refer to the approach of an entire system, rather than simply a court building or jurisdiction. Agencies work together to identify, track and risk assess domestic violence cases, support victims and share information so that offenders are brought to justice. The following discussion highlights these innovative court responses to the continuing problem of domestic violence in the UK. It should be noted that whilst many of the courts discussed below

¹⁸⁴ See, Bowen P, Qasim A, & Tetenbaum L, "Better Courts: A Snapshot of Domestic Violence Courts in 2013", Centre for Justice Innovation: London, (2014). This report is available online at http://b.3cdn.net/nefoundation/667bd380bdc5bac599_e4m6b0z7o.pdf (last accessed 29/7/17).

¹⁸⁵ The Specialised Domestic Violence Courts examined in this section, pertain only to those within Britain and not the devolved regions of Northern Ireland, Scotland or Wales.

¹⁸⁶ For a fuller account on the history of domestic violence courts in the US please refer to, Mazur, R. & Aldrich, L. "What makes a domestic violence court work? Lessons from New York", 5 American Bar Association's Judges' Journal 42, (2003).

¹⁸⁷ Cook, D., Burton, M. & Robinson, A, "Enhancing "Safety and Justice": The role of specialist domestic violence courts in England and Wales", 7 British Society of Criminology 1 (2006).

¹⁸⁸ For further information please refer to the Crown Prosecution Service website at <http://www.cps.gov.uk/publications/equality/vaw/SDVC.html> (last accessed 29/7/17).

¹⁸⁹ *Ibid.*

¹⁹⁰ See, "Better Courts: A Snapshot of Domestic Violence Courts in 2013", *supra* note 184.

were implemented prior to 2006, they have been identified by the UK government as specialised domestic violence courts under the 2006 SDVC Programme.¹⁹¹

1. Derby Dedicated Domestic Violence Court¹⁹²

The DDDVC is the newest of the three UK courts being examined in this section. Derby City Partnership¹⁹³ in conjunction with the Crown Prosecution Service,¹⁹⁴ Police and Magistrates' Courts agreed to trial the introduction of a dedicated domestic violence court for twelve weeks in 2003. Due to its success, it became a permanent fixture. Its primary objectives were, firstly the need for speed in bringing cases to court. Secondly it intended to bring together those agencies whose combined weight were influential in securing the safety of victims and witnesses (particularly children).¹⁹⁵ The DDDVC, effectively aimed, to provide an increased level of support to victims to address the issue of victims withdrawing from the criminal justice system.¹⁹⁶

The court is supported by a partnership of the courts, the CPS, the Domestic and Sexual Violence Strategy Group and several voluntary sector groups. The Domestic and Sexual Violence Strategy Group co-ordinates delivery of support services across Derbyshire. It reports to the Safer Strategy Group and into the Safer and Stronger Executive Board. The group played a major role in setting up the SDVC, providing a forum for local agencies to discuss the kind of support victims should receive as part of the process.¹⁹⁷ Derbyshire

¹⁹¹ Home Office, "*Specialist Domestic Violence Courts Review 2007-08*", (2008), Annex A. This Review is available online at <http://www.crimereduction.homeoffice.gov.uk/dv/dv018a.pdf> (last accessed 28/7/17).

¹⁹² Hereafter referred to as the DDDVC.

¹⁹³ The Derby City Partnership comprises of statutory and voluntary agencies, L.A., Probation Service, Social Services etc.

¹⁹⁴ Hereafter referred to as the CPS.

¹⁹⁵ Cook *et al*, "*Evaluation of Specialist Domestic Violence Courts/Fast Track Systems*" Crown Prosecution Service, (2004), at 59, available online at <https://www.cps.gov.uk/publications/docs/specialistdvcourts.pdf> (last accessed 29/7/17).

¹⁹⁶ See, Crown Prosecution Service, "*Derbyshire Annual Report 2003-2004*", (2004), at 8 (discussing the Derby Domestic Violence Court). This report is available online at <https://www.cps.gov.uk/derbyshire/assets/uploads/files/Derbyshire%202003-04.pdf> (last accessed 28/7/17).

¹⁹⁷ *Ibid.*

Criminal Justice Board¹⁹⁸ similarly plays a key role in supporting the DDDVC.¹⁹⁹ It provides strategic guidance to the DDDVC through performance monitoring and coordinating review meetings. Such review meetings provide an opportunity for those involved with the court to discuss ideas and any matters arising.²⁰⁰ This approach highlights the extent to which a coordinated multiagency response to domestic violence is preferable to the traditional handling of such cases. Like its American and Canadian counterparts, the DDDVC has also utilised an integrated community approach that comprises support and advocacy services for victims. In fact, Neil Hoodless, CPS Prosecutor, and domestic violence coordinator has stated that supporting victims of domestic violence is a priority within the criminal justice system in Derbyshire.²⁰¹ He has argued that the establishment of a specialised court highlights that domestic violence is being taken extremely seriously by all interested parties.²⁰² Whilst a number of possible elements have been identified which may potentially aid and improve the determination of FGM and other gender-based claims within the RDP, the words of Neil Hoodless ring true. Whilst specialised courts are a good approach to addressing complex cases and a coordinated response has been effective, unless decision-makers are adequately trained and committed to addressing such cases and supporting claimants, then the system will remain weak. As such, as the specialised domestic violence courts have shown, training, specialization and qualified decision-makers, advocates and associated personnel are required to ensure effective adjudication.

The core principles of the DDDVC include providing: (1) access to support for victim's in particular providing a 'go-between' between the courts, police and CPS; (2) the co-ordination of partner agencies; (3) a victim and child friendly court; (4) specialist

¹⁹⁸ Hereafter referred to as the DCJB.

¹⁹⁹ Its membership is extensive and consists of the following key players: Derbyshire Constabulary, Derbyshire CPS, Her Majesty's Court Service, Her Majesty's Prison Service, Derbyshire Probation Area, and Derby Community Safety Partnership. The Legal Services Commission and Victim Support are also members of the Board.

²⁰⁰ See, Cook *et al*, *supra* note 195.

²⁰¹ The comments of Neil Hoodless, CPS Prosecutor, and domestic violence coordinator are available online via the Crown Prosecution Service Derbyshire website at http://www.cps.gov.uk/derbyshire/cps_derbyshire_news/press_releases/success_of_domestic_violence_court_in_derby/ (last accessed 22/9/15).

²⁰² *Ibid*.

personnel, including CPS prosecutors, legal advisors and magistrates who have all been trained in domestic violence awareness and procedures.²⁰³ These principles are reflected not only in the process itself but also in the layout of the actual court. The DDDVC which runs from the Southern Derbyshire Magistrates Court is centrally located so as to facilitate easy access to the court. Whilst there are no separate entrances for victims and perpetrators, security at the entrance to the court is provided by staff with body scanners. Furthermore, the Southern Derbyshire Magistrates' Court has provision for special measures, including TV and video-link equipment and screens, as well as a separate waiting area (with secured entry) for victims and witnesses who do not wish to have contact with the perpetrator. Victims can also choose to enter and exit the court via a rear entrance to avoid contact with the perpetrator if they so wish.²⁰⁴

The Magistrates' Court deals only with pre-trial hearings, including bail variations, pleas, pre-trial reviews, pre-sentencing reports, and sentencing. All cases falling within the agreed CPS definition of domestic violence will be charged and bailed to the domestic violence court. Derby runs one court for a half day a week, usually on a Wednesday and during this time there are normally about 15 to 18 cases heard.²⁰⁵ Some cases fall outside the DDDVC, for instance, those not processed within the time constraint. However, if such a case is adjourned they will re-enter the specialist court at the next hearing.²⁰⁶

According to Cook *et al*, the DDDVC court set-up “reflects a multi-agency, partnership approach”.²⁰⁷ Several agencies attend at court. The police domestic violence officer attends so as to provide up-to-date information on the case at hand or to answer any queries which the court may have. An independent domestic violence advisor is also available to take details of adjournments and changes in pleas and bail conditions, in order to communicate the information back to the victim as quickly as possible. This advisor also assists victims who attend court at any of the pre-trial hearings. Similar initiatives would aid FGM claimants, firstly by keeping them informed of what decision-makers have decided and helping them begin the appeals procedure if need be; and secondly, the

²⁰³ See, Cook *et al*, *supra* note 195.

²⁰⁴ *Ibid*.

²⁰⁵ Cook *et al*, *supra* note 195, at 59.

²⁰⁶ *Ibid*.

²⁰⁷ *Ibid*

attendance of experts and trained researchers can further help to provide up-to-date information on presented evidence and answer any questions which decision-makers may have in respects of the evidence presented. Furthermore, within the domestic violence court a representative from the probation services and from the housing department should also be present in court.²⁰⁸ The CPS prosecutor is a specialist in domestic violence and magistrates sitting in the court have also received additional training on domestic violence. Since its inception the DDDVC has witnessed an increase in the effectiveness of court and support services for victims of domestic violence, greater accountability of perpetrators, improved risk management of victims and children, and improved victim participation and satisfaction.²⁰⁹

2. Leeds Domestic Violence Cluster Court²¹⁰

The longest-established of the specialised domestic violence courts in Britain, the LDVCC has been in operation since 1999. It was also the first court to adopt the cluster model in England and Wales. Within the LDVCC, there are three courtrooms in operation which house domestic violence hearings. Provisions are also available for the use of special measures. The Leeds court is magistrates only and deals with only pre-trial hearings, including pleas, bail variations, pre-sentence reports, sentencing and pre-trial reviews.²¹¹ Accordingly, the court does not deal with trials. Like the DDDVC, all cases falling within the agreed definition of domestic violence will be charged and bailed to the LDVCC.

The aims of the LDVCC are: (1) to increase the effectiveness of court systems in providing protection and support to women and appropriate sanctions to perpetrators; and (2) to increase the coordination of professional bodies involved in processing perpetrators.²¹² Thus, its objectives are to: (1) develop and coordinate a domestic violence court; (2) identify methods to monitor cases and outcomes; (3) rationalise training for

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Hereafter referred to as the LDVCC.

²¹¹ Cook *et al*, *supra* note 195, at 60.

²¹² *Ibid*, at 53.

involved professionals; (4) promote the schemes with government offices and other potential funders; and finally (5) develop a set of principles for the scheme which clearly address women's safety and hold perpetrators accountable.²¹³

Like the courts previously discussed, a multi-agency partnership approach has been adopted in developing this court.²¹⁴ Specifically, advocacy support is provided for victims by HALT and a representative of this body and a specially trained domestic violence police officer is always available at the Court(s).²¹⁵ CPS prosecutors and a designated case-worker prosecute the hearings and agents carry out the trials.

A Steering Group which comprises of representatives from HALT, the CPS, police, witness services, probation services, the court and Leeds Inter-Agency Partnership, meets monthly to review any matters arising from the LDVCC.²¹⁶ Furthermore, HALT monitors its own project, which is not primarily focused on the court but rather on the services it provides to victims of domestic violence.²¹⁷ HALT is a pioneering and innovative charity, working with women to reduce further risk of abuse and improve their safety. The work of HALT in the LDVCC is exceptional, offering legal advice, support and advocacy to victims of domestic and sexual violence. HALT case-workers, offer independent support around domestic and sexual abuse. These case-workers become the primary point of contact for victims who have reported a domestic violence incident to the police, and where a court case may happen.²¹⁸ Case-workers work with victims to assess the level of risk which they may face and in turn discuss suitable options and develop a joint safety plan.²¹⁹ In sum, HALT works with victims to address their immediate safety and takes practical steps to help victims protect themselves and their children. HALT case-workers also look at longer term solutions such as housing options and remedies available from

²¹³ *Ibid.*

²¹⁴ Partners involved with the court include: the police, CPS, the Help Advice and the Law Team (HALT), and the Magistrates Court Service, particularly instigated and driven at first and with strong support from Leeds Inter-Agency Partnership and HALT. *See, Cook et al, supra note 195*, at 60.

²¹⁵ *Ibid.* Though these representatives cannot be in the three courts at once, they are always in the building. This was a problem addressed at the multi-agency monthly meeting, where a solution was proposed – that ushers be notified of the location of these representatives, so that if they were needed in a particular court, everyone would know where to find them.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *See*, HALT website, available online at <http://www.halt.org.uk/> (last accessed 29/6/17).

²¹⁹ *Ibid.*

the criminal and criminal courts.²²⁰ More importantly, HALT case-workers also prepare victims for their day in court. They will: (1) attend court hearings or other appointments as appropriate with victims; (2) provide support before, during and after court hearings; (3) organise a look around an empty court room prior to the case being heard in court; (4) explain the terminology and procedures of the court which is very often uncommon to most victims; and (5) introduce victims to relevant key personnel and explain their roles.²²¹

According to Cook *et al*, key informants believe that the establishment of the LDVCC has improved the recognition of the seriousness of domestic violence.²²² They further argue that the LDVCC has also identified training needs for all members involved in its operation and consequently this has significantly improved the level of information flow through different agencies.²²³ Not only has the processing of domestic violence cases been speeded up by the introduction of the LDVCC, but the proactive partnership of all those involved with the court means that the needs and concerns of victims, in addition to holding perpetrators accountable, are given immediate legal advice, support and advocacy options.

Like the approach adopted in this and others, the complexity of FGM also requires a gendered partnership approach within the RDP. Decision-makers, agencies, legal representatives and other interested parties, need to work together to determine refugee status in a robust system of services which is gender-sensitive, promotes the sharing of information and supports claimants.

3. West London Specialised Domestic Violence Court²²⁴

The WLSDVC which began operation in October 2002 aims to increase the effectiveness of the judicial system by: (1) providing protection and support to victims and witnesses of domestic violence; (2) providing appropriate sanctions to perpetrators; (3) reducing

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² Cook *et al*, *supra* note 195, at 61.

²²³ *Ibid.*

²²⁴ Hereafter referred to as the WLSDVC.

delay through effective case management; (4) to further increase coordination of agencies, including the Crown Court, involved in supporting victims and witnesses and dealing with perpetrators; (5) to explore the potential for linking civil courts into the criminal justice process at WLMC; (6) reduce repeat victimisation; (7) increase charging; and (8) increase the number of perpetrators sent to violence prevention programmes.²²⁵

The court is co-ordinated by Standing Together against domestic violence multi-agency partnership. The court is the first specialised domestic violence court in Britain and Wales to hear pre-trial reports and trials.²²⁶ Significantly, the court has established a written protocol, a component of best practice in developing a specialised domestic violence court.²²⁷ It aims to increase the effectiveness of the judicial system in providing protection and support to victims and witnesses of domestic violence and appropriate sanctions to perpetrators and by reducing delay through effective case management. Secondly, it aims to increase co-ordination of agencies, including the Crown Court, involved in supporting victims and witnesses and dealing with perpetrators. Thirdly, it aims to explore the potential for linking civil courts into the criminal justice process at the West London Magistrates Court.²²⁸

Several key features underpin the successful workings and arrangements of the WLS DVC. A key strength of the court stems from the commitment of Hammersmith and Fulham police to ensure the attendance of a community safety unit officer at court. This is further strengthened with the agreement of the Kensington and Chelsea police to provide an officer who will attend bail hearings and trials as well as deal with matters over the telephone.²²⁹ In a similar vein to the other domestic violence courts discussed throughout this chapter, the WLS DVC also provides advocacy support for domestic violence victims. The court has secured a commitment from ADVANCE Advocates and Eaves Women's Aid to attend the court to offer support to victims/witnesses and to collect results in their relevant cases.²³⁰ Both ADVANCE and Eaves take referrals from the

²²⁵ Cook *et al*, *supra* note 195, at 53-4.

²²⁶ *Ibid*, at 62.

²²⁷ *Ibid*.

²²⁸ *Ibid*.

²²⁹ Cook *et al*, *supra* note 195, at 62.

²³⁰ *Ibid*, at 63. It should also be noted that a pre-court support/information gathering role is also played by Kensington and Chelsea Victim Support. While they can attend the court in exceptional circumstances, the normal procedure is to refer to Witness Services (Hereafter referred to as the WS). *Ibid*.

police, on a consent basis, and both offer pre-court support to victims, including pre-court visits if requested by victims.²³¹ More importantly, these two bodies also act as a “conduit of information between the victim/witness and the police, for example passing details of civil orders to the police and informing them of any harassment of the witness”.²³² In addition to the support provided by both ADVANCE and Eaves, the WS at the WLS DVC is also committed to providing support to all witnesses and can provide pre-court orientations. The WS also meets victim/witnesses when they attend court and by prior arrangement, to arrange separate entrances. Additional services include keeping the police and victim advocates informed of any changes in bail conditions and informing interested parties of the outcomes of completed cases.²³³

As a co-ordinated response and to ensure that all those involved with the court are aware of the complexities of domestic violence, the police, ADVANCE and the CPS train all agencies involved together. Consequently, the WLS DVC ensures that district judges, magistrates, legal advisers and other court staff have received domestic violence training. In order to maintain cohesiveness, the CPS also assigns appropriately trained and experienced prosecutors in domestic violence cases to the court.²³⁴

According to Cook *et al* another significant feature of the West London Court is the arrangement that they have with the Inner London and City Family Proceedings Court to obtain information concerning civil orders.²³⁵ A running log of civil orders is maintained and available in the court for cross checking against defendants who appear in the WLS DVC.²³⁶ Such agreement and co-operation is imperative as this network of information ensures that judges are fully aware of the situation as quickly as possible, thus ensuring a rapid response and more stringent enforcement of sanctions.

4. Perpetrator Programmes and Pilot on Forced Marriage and so-called Honour Crimes

²³¹ Cook *et al*, *supra* note 195, at 63.

²³² *Ibid*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

As well as providing support to victims and challenging domestic violence, like their American and Canadian counterparts, the UK specialist domestic violence courts/programmes, also seek to hold perpetrators accountable and address the behaviour of offending. The Sentencing Guidelines Council issued principles for domestic violence cases in 2006. These guidelines make clear that offences committed in a domestic context should not be regarded as less serious than offences committed in a non-domestic context.²³⁷ In addition to the imposition of fines and custodial and community sentences,²³⁸ referrals and participation programmes are also commonly used.²³⁹ These programmes highlight the therapeutic underpinnings of these courts.

In addition to perpetrator programmes another innovative development within the UK context concerns the use of programmes to address unique cases of domestic violence. In 2007-8, the CPS ran four pilots in London, Lancashire, West Yorkshire and the West Midlands, to identify and monitor forced marriages and so-called Honour cases for the first time.²⁴⁰ Specialist prosecutors, who were selected, trained and given guidance, led on the prosecution of cases.²⁴¹ They also provided advice about these cases and shared best practice with colleagues.²⁴² According to the National Delivery Plan, the pilot which concluded in March 2008 determined that the specific needs of such victims and witnesses

²³⁷ Sentencing Guidelines Council, “*Overarching Principles: Domestic Violence- Definitive Guideline*”, (2006), Foreword. This document is available online at https://www.sentencingcouncil.org.uk/wp-content/uploads/web_domestic_violence.pdf (last accessed 25/6/17).

²³⁸ See generally, Cook *et al*, *supra* note 195, at 78-80.

²³⁹ See, HMCS, “*Domestic Violence: A Guide to Civil Remedies and Criminal Sanctions*” (2007), at 29. This guide is available online at

<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/domestic-violence-guide-march07.pdf> (last accessed 29/7/17). During the beginning of 2006/07, all accredited Domestic Abuse Perpetrator Programmes within the Criminal Justice System satisfied the Correctional Services Accreditation Panel (CSAP) quality standards and for the first time, targets were set by the National Offender Management Service (NOMS) for programme completions. *Ibid*.

²⁴⁰ See, HM Government, “*National Domestic Violence Delivery Plan: Annual Progress Report 2008-09*”, Home Office, (2009), at 25. This report is available online at <http://webarchive.nationalarchives.gov.uk/20100408132345/http://www.homeoffice.gov.uk/documents/dom-violence-delivery-plan-08-092835.pdf?view=Binary> (last accessed 17/6/17).

²⁴¹ *Ibid*.

²⁴² For a complete review of the recommendation made please see, Crown Prosecution Service, “*CPS Pilot on Forced Marriage and so-called ‘Honor’ Crime Findings*”, (2008), available online at http://www.cps.gov.uk/publications/docs/findings_from_cps_pilot_on_forced_marriage.pdf (last accessed 26/6/17). See also, Crown Prosecution Service, “*Recommendations on Future Work on Forced Marriage and so-called ‘Honor’ Crime*”, (2008), available online at https://www.cps.gov.uk/publications/docs/forced_marriage_and_honour_crime_recommendations.pdf (last accessed 26/6/17).

needs to be addressed. It was also recommended that specific actions, including the importance of correctly identifying and flagging these cases and the training of selected prosecutors within the CPS, needs to be taken. These recommendations it was hoped would be in operation before 2010.²⁴³ However, there has been no consistent approach and it was not until 2016, that any real materialisation of those recommendations happened. In December 2016, the CPS and the police published the first ever joint honour-based violence/abuse and forced marriage protocol²⁴⁴ outlining their commitment to the successful investigation and prosecution of these crimes. The protocol recognises the importance of strong partnership working between these two agencies. The protocol highlights the unique complexities of these cases and the barriers victims face in coming forward to report. For example, the potential that these crimes may not only be committed by family members but also by those who are part of the wider community. Rather than families and communities protecting the victim, they will often protect the perpetrator. The protocol emphasises the importance for multiagency working and engagement with specialist third sector organisations. The CPS has led the development of this protocol, as part of a wider commitment to improve performance in this area. The protocol enables police and prosecutors to quickly understand the action they must take when a crime is reported to the police and referred to the CPS for a charging decision, ensuring the safety of the victim is at the heart of the process.

These innovative pilots and subsequent outcomes support the objectives of the thesis in calling for the reform of the RDP and reaffirm my conviction that like domestic violence, acts of violence, particularly those committed by and within minority communities within the UK cannot be categorised as ‘cultural’ or legitimate. This expansive and protectionist approach has been reaffirmed with the introduction of The Forced Marriage (Civil Protection) Act 2007.²⁴⁵ The aim of that Act is to provide civil remedies for those faced with forced marriage and victims of forced marriage. Under the

²⁴³ See, “*National Domestic Violence Delivery Plan: Annual Progress Report 2008-09*”, *supra* note 240, at 25-6.

²⁴⁴ For a complete overview of the Protocol see, Crown Prosecution Service, “*Protocol on the Handling of ‘so-called’ Honour Based Violence/Abuse and Forced Marriage Offences between the National Police Chief’s Council and the Crown Prosecution Service*”, (2016). This document is available online at <http://www.cps.gov.uk/publications/agencies/index.html> (last accessed 1/7/17).

²⁴⁵ Forced Marriage (Civil Protection) Act 2007. This Act can be accessed online at http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070020_en.pdf (last accessed 7/7/17).

Act, victims may apply to the court for a Forced Marriage Protection Order (FMPO). A relevant third party, such as a local authority, may also apply on behalf of the victim for an FMPO. Breach of an order is treated as a contempt of court.²⁴⁶ On 16th June 2014, the Anti-social Behaviour, Crime and Policing Act 2014 came into force criminalizing forced marriage.²⁴⁷ This makes forced marriage and the breach of a Forced Marriage Protection Order criminal offences. This legislation sends a clear message that forced marriage will not be tolerated and perpetrators will be held accountable. This supports the thesis position that culturally recognized practices, including FGM, do not lose their criminal label just because some people demand that they be labelled as such.

Consequently, harmful cultural practices and traditions, such as forced marriage can now also be classified as forms of domestic violence, which the UK government is now recognising and addressing. Similar, specialised projects now need to be implemented within the refugee determination system so as to ensure that those women and young girls fleeing FGM (who are deemed to be credible and who meet the requirements of refugee status) are adequately protected, and not rejected on account of the practices' cultural and religious underpinnings.

All of the model domestic violence courts examined throughout this chapter “reflect a growing trend toward greater recognition of the seriousness of domestic violence, and seek to increase the resources and programmes available to address this issue”.²⁴⁸ Positive lessons can be learnt from the establishment of these courts, particularly the innovative pilot programmes established in the UK to address unique cases of domestic violence. Such innovative trends reveal a greater integration of services within the legal system, from the earlier programmes which focused entirely on law enforcement and prosecutorial policies, to the more recent programmes which also incorporate additional services for perpetrators and more importantly for children and victims.²⁴⁹ Aside from the basic legal claims in a complex domestic violence case, issues of victim support and advocacy,

²⁴⁶ Gay O, “*Forced Marriage – Consultation Paper*”, House of Commons: Home Affairs Section, (2015), at 1. This document is available online at <http://researchbriefings.files.parliament.uk/documents/SN01003/SN01003.pdf> (last accessed 6/7/17).

²⁴⁷ See, Anti-social Behaviour, Crime and Policing Act 2014, 2014 c. 12. This Act can be accessed online at <http://www.legislation.gov.uk/ukpga/2014/12/contents> (last accessed 6/7/17).

²⁴⁸ Tsai, *supra* note 4, at 1309.

²⁴⁹ *Ibid.*

perpetrator accountability and monitoring, and the mental health concerns of all parties involved are emerging as important considerations.²⁵⁰ The incorporation of several of these elements within the RDP can help to establish a fair, open and gender-sensitive process for FGM claimants. Reform, as will be discussed in the next chapter will help to correct the legal, historical and moral disparities in the protection afforded to female refugee claimants.

Conclusion

Over the past decade, hundreds of additional experimental courts have emerged, all testing innovative solutions to complex issues such as domestic violence. While each of these initiatives targets a different problem, they all use the authority of courts in innovative ways to improve outcomes for victims, communities and defendants. And in the process, they all seek to shift the focus of courts from simply processing cases to achieving tangible results such as victim support and advocacy. These innovations, as elaborated upon throughout this chapter, challenge the nature of courts and represent something of a revolution in the way in which courts and legal forums operate in modern, democratic societies, particularly in respect of affording protection to women, from all backgrounds and cultures. These courts are examples of legal institutions working in partnership with other agencies, both inside and outside of the conventional justice fields, to produce more favourable outcomes. Arguably, a strong system of services and support to empower victims is a foundational component of societal response to domestic violence. To effectively implement reform within the RDP a coordinated gendered system which responds to the absence of a gendered lens and the exclusion of women's needs is needed. Interagency, co-ordinated approaches to safeguarding and promoting the rights of women are positive. A prime example being the 2015 Gender Principles for Dealing with the Legacy of the Past.²⁵¹ These guidelines, which were developed by Dr Catherine O'Rourke

²⁵⁰ *Ibid.*

²⁵¹ For an overview of the Guidelines and their development, *see*, Schulz P & O'Rourke C, "*Workshops Report: Developing Gender Principles For Dealing with the Legacy of the Past*", Legacy Gender Integration Group: Belfast, (2015). This report is available online at

from Ulster University and her colleagues within the Legacy Gender Integration Group²⁵² were designed to ensure that the gendered impact of the conflict and post-conflict legacy needs of women will be adequately addressed in processes emerging from the Stormont House Agreement.²⁵³ Whilst, these guidelines are not directly relevant to the thesis, the manner in which they have been developed is of central importance. They highlight that a co-ordinated response to a problem can be the solution. This stance needs to be employed within the RDP. If the legislative improvements of the past forty years are to have a real and continuing impact, they need to be transposed into the RDP to convey the message that violence against women at all levels of the judicial system will not be tolerated. Thus, the existing gender-guidelines, current procedures and attitudes of decision-makers within the RDP process must undergo substantial self-reflection and corresponding reforms. Having examined the criminal justice systems shift in attitudes and practises towards domestic violence, a number of reforms which may be transposed within the RDP have been identified. These potential reforms may aid decisions-makers in their determinations of FGM and ensure that claimants are not discriminated against and unfairly denied protection due to a lack of understanding and training in respects of gender violence. Arguably, as the last and quite possibly the only resort of victims seeking protection, it is essential that the RDP and those involved within it improve their responses to victims of FGM and other gender-based forms of violence. These reforms will now be discussed in Chapter Five.

https://www.ulster.ac.uk/_data/assets/pdf_file/0018/74070/Legacy-Gender-Integration-Group-Workshops-Report-Developing-Gender-Principles-for-Dealing-with-the-Legacy-of-the-Past_18-11-2015.pdf (last accessed 27/7/17).

²⁵² *Ibid*, at 1. The Legacy Gender Integration Group, is an informal network of individuals with gender expertise from civil society and academia. The Legacy Gender Integration Group came together in April 2015 to work for the integration of gender into SHA legislation and implementation.

²⁵³ *Ibid*.

Chapter Five

Conclusion: Recommendations

Introduction

This thesis had an explicit aim to redress the inconsistent and inadequate treatment of gender-based claims for refugee status by decision-makers, focusing exclusively on the controversial cultural practice of FGM. It has revealed that a double standard exists in these cases. On the one hand States unselfcritically¹ term FGM as ‘barbaric’, and yet on the other, fail to accord protection to those individuals challenging that norm and seeking protection. FGM, which epitomizes gender inequality, has been the subject of considerable critical attention since the 1970s.² The extensive condemnation of the practice, like the traditional approach to domestic violence stands in stark contrast to its widespread prevalence today.³ FGM is increasingly entering the legal arena in the case-studies and other States as an alleged persecutory practice grounding a claim for refugee status. Judicial attitudes have been characterized by overall inconsistency; some decision-makers, mindful of the immigration risks in opening a floodgate to a large group of would be refugees, have refused refugee status, on occasion defending this gate-keeping approach in the language of cultural relativism despite the applicants’ explicit rejection of the custom.⁴ In other cases an affirmation of universal human rights norms has been coupled with an arrogant, even racist willingness to critique the practice and justify international normative reference.⁵

As the caselaw has revealed, the task of defining a just, humanitarian standard for a grant of refugee status in FGM cases is complex. Coupled with procedural and evidential barriers, in an era where States have tightened border controls, FGM claimants face great challenges in obtaining refugee status. The findings in the thesis have deepened the

¹ See, Smith A, Scott A & Nash K, “*New Critical Writings in Political Sociology: Globalisation and Contemporary Challenges to the Nation-State*”, Routledge: London, (2017), Chapter 14.

²*Ibid* (noting that human rights advocates and health professionals have stressed the undisputable and treacherous health consequences of FGM, its short and long-term painfulness as well as its place within a gendered system of oppression).

³*Ibid*.

⁴*Ibid*.

⁵*Ibid*.

contention that the current refugee ‘lottery system’ is badly failing to meet the challenging claims brought by women, and that claimants are let down, both, by an extremely poor standard of decision-making and by a non-gendered RDP. In fact, the FGM jurisprudence and evidence within each of the case-studies, reveals that women are too often refused refugee status on grounds that are arbitrary, subjective, and demonstrate limited awareness of legal obligations under the Refugee Convention.⁶ Furthermore they reveal that existing gender-guidelines are either inconsistently observed or completely ignored. Ultimately, whilst the gender-guidelines implemented by the case-studies may have led to an awareness of gender issues, alone they are not enough to ensure equality in FGM refugee determinations. The need for a comprehensive gender policy aimed at refugee processes goes beyond making the guidelines binding or adding gender to existing definitions of persecution, or changing asylum laws. The case studies have recognised gender persecution but have chosen not to amend legislation, but rather to provide non-binding guidelines on how gender may be incorporated into the refugee grounds of persecution. Ultimately, by including the category of gender within its legislation and giving it legally binding status, States would show a real commitment towards the recognition of women’s rights and gender equality.⁷ However, in 2017 in an era of mass refugee migration, associated with terrorism related atrocities committed by purported refugees,⁸ it is unlikely that this status will be accomplished.

The central hypothesis of this thesis was that, if FGM was subject to the same protective processes implemented within specialised domestic violence courts, the RDP

⁶ Muggeridge H & Maman C, “*Unsustainable: The Quality of Initial Decision-Making in Women’s Asylum Claims*”, (2011), at 5. This UK report produced by Asylum Aid can be accessed via the Asylum Aid website at <http://www.asylumaid.org.uk/data/files/unsustainableweb.pdf> (last accessed 23/7/17). See also, Schrag P, et al, “*Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*”, 52 William and Mary Law Review 651, (2010).

⁷ Valji N & De La Hunt L, “*Gender Guidelines for Asylum Determination*”, University of Cape Town Legal Aid Clinic: Rosebank, (1994), at 4. This report is available online at <http://ccrweb.ca/sites/ccrweb.ca/files/static-files/safr.PDF> (last accessed 24/7/17).

⁸ See, Crisp J, “*Refugees: the Trojan horse of terrorism?*”, (2017). This report is available online via the Open Democracy Website at <https://www.opendemocracy.net/can-europe-make-it/jeff-crisp/refugees-trojan-horse-of-terrorism> (last accessed 23/7/17); Scarborough R, “*Islamic State Finds Success Infiltrating its Terrorists into Refugee Flows to West*”, (2017). This article is available online via The Washington Times Website at <http://www.washingtontimes.com/news/2017/jan/29/isis-finds-success-infiltrating-terrorists-into-re/> (last accessed 24/7/17). See also, Mogire E, “*Victims as Security Threats: Refugee Impact as Host State Security in Africa*”, Ashgate Publishing Limited: Surrey, (2011), at 142.

would be more inclusive and accommodating of the needs of claimants. The purpose of this chapter, therefore, is to offer several recommendations to potentially engender the RDP and make it more accommodating for FGM claimants and in tandem other victims of gender-based violence. These reforms could arguably play a central role in redressing the inconsistent and inadequate treatment of such claims by decision-makers, and ensure that claimants have access to a fair and accommodating decision-making process, one well-removed from the current ‘lottery’ system. In section I, I explain how this conclusion has been reached and highlight some of the best practices emanating from the domestic violence courts. Sections II through to VII propose several recommendations to improve the treatment of FGM within the RPD. To conclude, I will end with some general comments in respects of the need for accountability and a gendered partnership approach within the RDP in respects of gender-based claims for refugee status.

I. A Gender-Sensitive Court or Process

The RDP can be a daunting experience for anyone.⁹ FGM claimants face additional hurdles, including language and cultural barriers. Reducing trauma and making the process accommodating is recommended to increase the quality of testimony so that a fair determination can be made. Since the 1990s, specialised domestic violence courts have emerged. Like the innovative UK pilot programmes to address domestic violence, these courts typically exhibit some, or all, of the following: specialised procedures, specialised personnel, emphasis on specialised support services, special arrangements for victim safety, and problem solving or therapeutic approaches. Whilst the creation of a single specialised court to deal with gender-based refugee claims would help to potentially rectify many of the problems discussed throughout the thesis, it is impractical due to the asylum/immigration necessities of States. Like the complexity of domestic violence, FGM

⁹ Victims/claimants in any legal process are often unaware of what happens in court, what is expected of them, who participates in the process, who to talk to, where to go, when to go, why they are needed, why their role is an important and necessary one, how the court/hearing process operates, and how they should prepare. Furthermore, other factors, such as lengthy delays before and during the case, a lack of legal knowledge or representation, the environment of the courtroom, facing strangers, and being questioned, only add to the intimidating, tense, uncomfortable, and often times painful experience of the legal process for individuals.

requires a gendered partnership approach within the RDP. Decision-makers, legal representatives and other interested parties, need to work together to determine refugee status in a robust system of services which is gender-sensitive, promotes the sharing of information and supports claimants. This approach would firstly, promote a gender inclusive and gender sensitive review process. Secondly, ensure that decision-makers and interested parties recognise the social and cultural difficulties FGM applicants face when making and presenting gender-related claims. Thirdly, due to the subjective nature of refugee determination, it is hoped that such an approach will hold decision-makers accountable for their determinations. The following sections, beginning with an examination of the decision-making panel, will highlight the best practices emanating from the domestic violence courts which may be transposed within the RDP to achieve the above objectives.¹⁰

A. Constitution of the Determination Panel & Conducting the Review

At the earliest opportunity the panel should be informed of any factors relating to the claim that would make it appropriate for a decision-maker(s) of a particular gender, preferably female, to conduct the review. Early identification would enable the panel to consider such a request at the time the matter is allocated to a decision-maker to conduct the review. Likewise, if an interpreter of a particular gender is requested, due consideration should also be given. It is essential that claimants are given information about the RDP, access to it, as well as legal advice, in a manner and language that she understands. FGM claimants face difficulty in making and presenting their claims. The difficulties, as is evident from the case-law, include but are not limited to: an assumption that female applicants' claims are derivative of male relatives claims; a claimant may have difficulty in discussing her experiences of persecution because of shame or trauma;

¹⁰ It should be noted that most of the recommendations proffered in this chapter require resources, both human and financial. Unfortunately, due to word constraints and the complexity of this issue alone, it is not possible to examine this issue in detail. I will, however, proposed in light of my recommendations that, if a partnership approach is adopted, States, non-governmental organisations and other interested parties can create possibilities for operationalizing research and knowledge into concrete action and financial agreements to engender the RDP.

cultural differences or experience of trauma affecting a claimants ability to give testimony or her demeanour; the compounding effect on a claimants trauma that immigration detention may have; difficulties establishing the credibility of a claim; and a fear of rejection and/or reprisals from her family and/or community. Having detailed the difficulties it is proposed that the following recommendations will help to resolve these difficulties.

1. Pre-Hearing

In preparation for a hearing in a case where an FGM claim has been raised decision-makers should familiarise themselves with the applicable gender-guidelines and relevant COI that considers women's experiences in that country. The type of information usually relied on may not be available in relation to gender-related claims. Consequently, decision-makers may need to consult alternative sources including the testimonies of other women similarly situated in written reports or oral testimony, of nongovernmental or international organisations or other independent research.¹¹ Thorough preparation for a hearing will assist the decision-maker to develop a relationship of confidence and trust with the claimant, ask appropriate questions and deal with any issues that may arise during the hearing.¹² Similarly, where applicable or at the request of a claimants' representative, postponement of scheduled hearings should be allowed for receipt of particular information, including medical reports which may be relevant to the assessment of such a gender-related claim.

2. At the Hearing: Communication & Interpreters

In all hearings, like the approach in the domestic violence courts, decision-makers should seek to create an informal setting, which creates an open and reassuring environment to

¹¹See, UNHCR 7 May 2002, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, paragraph 37. Hereafter referred to as the UNHCR Gender Guidelines.

¹²*Ibid*, para 36.

establish trust and encourage the disclosure of personal information. Claimants should also be made aware of the RDP process, objectives, role of those involved, and be assured that any disclosed information will be treated in confidence. At the hearing, claimants should be questioned in a culturally sensitive and respectful manner which allows claims to be presented with minimal interruption and breaks as appropriate. Evidence should be given in the absence of family members and children. Applicants are routinely interviewed with children present, as they do not have or cannot afford childcare.¹³ Having children and other family members present at an asylum hearing is undoubtedly difficult and distracting and makes it difficult or impossible for women to discuss FGM and associated issues. Additionally, being present at the interview may traumatise the children. Childcare facilities need to be implemented.

Because of the sense of shame involved, women generally find it easier to disclose their experiences to other women.¹⁴ Practice by the police and victim support, through the domestic violence courts examined, is generally to provide female interviewers/advocates to victims.¹⁵ As noted above, due to the complexity of FGM and to ensure that claimants have access to a fair and accommodating process, appropriately trained female interpreters should be made available upon request.¹⁶ The right to an interpreter is a key issue for FGM claimants and whilst the RDPs of the case-studies permit the use of

¹³ Asylum Aid, “*Random Acts: Fact Sheet*”, (2017), available online via the Asylum Aid Website at <http://www.asylumaid.org.uk/random-acts-fact-sheet/> (last accessed 20/7/17).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ The CIRB Gender-Guidelines do not address the issue of whether or not gender-based claims should be conducted with all-female personnel (including interpreters), but they do state that, “In some cases it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women”. See, *Women Refugee Claimants Fearing Gender-Related Persecution - Guidelines* issued by the Chairperson pursuant to section 65(3) of the Immigration Act, Immigration and Refugee Board, Ottawa, Canada, 9 Mar. 1993, section 5.31. Hereafter referred to as the CIRB Gender-Guidelines. The Guidelines are available online via the Immigration and Refugee Board of Canada Homepage at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx> (last accessed 8/3/17). See also, *Asylum Gender Guidelines*, Immigration Appellate Authority, UK, Nov. 2000, section 5.31 (hereafter referred to as the UK Gender Guidelines) and *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, 26 May 1995, Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service, USA, at 5 (noting that victims may be inhibited about disclosing details of a sexual nature to men or male interpreters. Hereafter referred to as the INS Gender Guidelines. See also, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, Home Office, 2010, at 12

interpreters,¹⁷ there is a concern that services are inadequate. There is no specialised interpreter service for victims of gender-based violence and interpreters do not receive any specialised training on gender-based violence. Consequently, it is submitted that in order to fully represent what a victim of FGM is trying to communicate to the decision-maker(s) and to avoid undermining her efforts to obtain protection, it is vital that an interpreter should understand the dynamics of FGM as well as key legal terminology. The gender-guidelines examined in the thesis make no reference to the training of interpreters. Specialised gender awareness training is required.

Some of the examined specialised domestic violence courts have provided training for potential court interpreters on the topic of domestic violence, presented by domestic violence advocates.¹⁸ Similar, mandated training for interpreters working with victims of FGM should also be provided. While the interpreter is not an advocate and should never attempt to play this role, training in respects of the gender-guidelines and issues pertaining to gender-based violence will contribute to the interpreter's ability to communicate with the claimant. Such training is essential because, like decision-makers, interpreters may be so shocked by the words which they are asked to interpret in FGM hearings that they may be unable to continue. Training in advance of these hearings would help interpreters

¹⁷ The Canadian IRB recognizes the right for everyone to a fair hearing. Therefore, the IRB provides interpretation for any party who does not understand or speak any of the two official languages used in IRB proceedings. See, IRB, *“Interpreter Handbook”*, (2012), available online via the IRB website at <http://www.irb-cisr.gc.ca/Eng/BoaCom/pubs/Pages/Interpret.aspx#Toc342656893> (last accessed 24/7/17). In the UK, the Home Office will provide an interpreter at public expense whenever necessary. Interpreters must conduct themselves in a professional and impartial manner, and respect confidentiality at all times. Interviewers are responsible for the overall conduct of the interview. They must ensure that the interpreter behaves in accordance with, and not ask any interpreter to act outside the professional standards set out in the Interpreters Code of Conduct. See, Home Office, *“Asylum Policy Instruction: Asylum Interviews”*, Home Office: UK, (2015), at 25. This document is available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/410098/Asylum_Interviews_AI.pdf (last accessed 24/7/17). In the US system, a claimant has the right to have an interpreter present for any interview or court hearing so that the applicant can understand what is going on and assist in his or her application. During an asylum interview, a claimant must supply his or her own interpreter. This does not need to be a professional interpreter; a friend or family member who speaks English fluently will do. An asylum attorney typically will have the ability to find an interpreter that suits claimants needs. During any court hearing, the government will provide an interpreter for the asylum claimant upon request. This interpreter is typically not an employee of the government but a contractor hired solely for interpreting. See, New York Human Rights Committee, *“Interpreter”*, (2013). This information was taken from the Political Asylum Website at <http://www.politicalasylumusa.com/asylum-process/interpreter/> (last accessed 24/7/17).

¹⁸ Lemon N, *“Access to Justice: Can Domestic Violence Courts Better Address the Need of Non-English Speaking Victims of Domestic Violence”*, 21 Berkeley Journal of Gender Law & Justice 38 (2006), at 54 (discussing the Alaska Court System).

determine whether they will be able to cope with such highly sensitive and complex matters in cases they are translating, or if they should decline a case.¹⁹ Developing a panel of refugee interpreters prepared to work within the specialised gender would entail training them on issues pertaining to the gender-guidelines, their substantive provisions, the dynamics of FGM and gender-based violence, applicable legal terminology, and a short outline of the jurisdictions refugee laws and processes. Training should also include educating interpreters about the fact that refugee claimants may be expecting a very different court system from the one used within my respective case-studies. Such training can also be instrumental in preparing claimants for their hearings. For instance, if claimants are not aware that their oral testimony will be considered, (which many may assume as the authorities within their countries of origin would not listen to them) they may assume that there is no point in appearing at a determination hearing, or speaking. In describing the RDP to FGM claimants, interpreters may be able to explain the process in a manner which they can understand, and in turn explain that while authority figures in their countries of origin were unwilling to listen to their claims, decision-makers in their ‘refuge states’ will listen to her tell her story and consider this as evidence. Such points of clarifications according to Lemon, “go toward the goal of allowing victims meaningful access to the court and should not be seen as interpreters interjecting their own opinions or advocating for the victims”.²⁰

II. Confidentiality

Like the approach adopted with the specialised domestic violence courts, claimants should be assured that their hearing is private and that they are safe. Refugee determination should at all stages respect the confidentiality of a refugee claim, including the fact that an application has been made. Information provided by the claimant to the authorities during the RDP is confidential and can only be used by the authorities for the purpose for which it was solicited, that is, to determine eligibility for international

¹⁹*Ibid.*, at 54.

²⁰*Ibid.*

protection. As a rule, no information should be shared with the authorities of the applicant's COI, nor should it be released to any third party without the express consent of the individual concerned. The applicant's consent must be freely offered and not obtained under duress.²¹ Reassurances of confidentiality can provide claimants with the psychological protection which they need to feel safe and open up about their experiences, thus bolstering their credibility claims.²² One way of promoting privacy is to ask claimants, if possible, to provide separate contact details from other family members, so that decision-makers and other interested parties can contact or correspond with her directly. All staff, including decision-makers and volunteers should be required to sign a confidentiality agreement, and at the beginning of the interview it is essential that some time is spent explaining the meaning of the duty of confidentiality of the decision-maker and interpreter. Furthermore, in instances where female interpreters and decision-makers are unavailable, the use of special measures as will be discussed in due course is paramount. Adjournments where appropriate should be permitted to establish trust and to ensure that all relevant information has been obtained.²³

III. Special Measures

Following the approach of the criminal justice system, within the specialised courts, vulnerable and intimidated witnesses are entitled to special measures.²⁴ These provisions

²¹ UNHCR, "*Refugee Status Determination: Identifying Who is a Refugee*", (2005), at 118. This document is available online at <http://www.refworld.org/pdfid/43141f5d4.pdf> (last accessed 24/7/17).

²² See generally, Pennebaker J.W., "*Opening Up: The Healing Power of Confiding in Others*", W. Morrow: New York, (1990). See also, Davis R & Brickman E, "*Supportive and Unsupportive Responses of Others to Rape Victims: Effects in Concurrent Victim Adjustments*", 19 American Journal of Community Psychology 443, (1991).

²³ For instance, if during the hearing it is considered appropriate that a claimant be given the opportunity to be assessed by a medical practitioner or counsellor, decision-makers should adjourn the hearing to enable the medical report or assessment to be obtained or for further investigations or enquiries to be made. Such information may be vital for deciding on the claim. Furthermore, decision-makers and advocates should also encourage claimants to seek appropriate counselling or other support services after a hearing or suggest to the applicant's representative that such services be sought.

²⁴ For further discussions on the use of special measures see, Hall M, "*The Use and Abuse of Special Measures: Giving Victims the Choice?*", 8 Journal of Scandinavian Studies in Criminology and Crime Prevention 33, (2007), at 33-53; Bull R, "*Research on Trying to Improve the Quality of Information Elicited from Vulnerable Witnesses*", 60 International Journal of Disability, Development and Education 53, (2013), at 53-57

help witnesses, including victims of domestic and sexual violence, give their best evidence in court and help to relieve some of the stress associated with giving evidence.²⁵ Whilst UNHCR policies and guidelines are relatively silent on the use of such measures, save to the extent that interpreters and suitably trained decision-makers should be made available when required, the 2002 UNHCR Gender-Guidelines state that, “the interview room should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances”.²⁶ Accordingly, the UK and CIRB Gender-Guidelines explicitly state that it may be appropriate in certain circumstances to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape.²⁷ Evidence of this practice is unclear and despite efforts to obtain such information my requests have repeatedly gone unanswered. Whilst this silence may indicate a reluctance to disclose that on account of the non-binding nature of the guidelines that such mechanisms are not readily utilised within the case-studies, their success within the domestic and international courts/tribunals have been widely documented,²⁸ and that success can similarly be replicated within the specialised gender hearings.

Before examining some special measures below, which may help to minimize the ordeal and trauma experienced by FGM claimants when giving their evidence, it is important to note that claimants should be made aware of the fact that such measures are available to them and can be accessed. However, these provisions, it is argued should only

²⁵ Crown Prosecution Service, “*Special Measures*”, (2017), available online via the Crown Prosecution Website at http://www.cps.gov.uk/legal/s_to_u/special_measures/ (last accessed 21/7/17).

²⁶ UNHCR Gender Guidelines, *supra* note 11, para 36 (iv).

²⁷ CIRB Gender-Guidelines, *supra* note 16, Section D.3. (“In some cases it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women”); UK Gender-Guidelines, *supra* note 16, section 5.6 (noting that evidence regarding sexual assaults may be given in writing or through video-link).

²⁸ Hamlyn B, *et al*, “*Are Special Measures Working? Evidence of Surveys of Vulnerable and Intimidated Witnesses*”, (2004). This report is available online at http://www.popcenter.org/problems/witness_intimidation/PDFs/Hamlyn_etal_2004.pdf (last accessed 21/7/17); Roberts *et al*, “*Monitoring Success, Accounting for Failure: The Outcome of Prosecutors' Applications for Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999*”, 9 International Journal of Evidence and Proof 269, (2005). *See also*, Doak J, “*The Victim and the Criminal Trial: A survey of Recent Trends in Regional and International Tribunals*”, 23 Legal Studies 1, (2003), at 1-32 & Ni Aolain F, “*Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*”, 60 Albany Law Review 883, (1997).

be utilised in instances where either or both female interpreters or decision-makers are unavailable and should be automatic where a claimant does not want to be interviewed by a male decision-maker.

A. Screens

The use of screens ensures that victims and witnesses can give their evidence without been seen by the defendant.²⁹ Within the RDP screens may be used as a means of preventing FGM claimants of having to give face-to-face evidence in front of either or both male interpreters and decision-makers. The only person who should be able to see the claimant in such an instance is her legal representative or any other female appointed to assist her. The use of screens may also be instrumental in overcoming the use of demeanour assessments as a means of determining whether a claimant is telling the truth, as discussed in Chapter Three. Thus, the inability to visually see a claimant, ensures that their appearance, attitude and manner will no longer be deciding factors in determining credibility. Attention and focus will be directed towards any objective, hard-core evidence submitted in support of an FGM claim.

B. Video-Link

Victims and witnesses can also give evidence from outside the courtroom through a live stream. This could be another room or a suitable location outside the court. Giving evidence in this way may make FGM claimants feel less intimidated as fewer people will be present whilst testimony is given and the ability to discuss such claims in a none face-to-face manner will potentially increase the quality of evidence provided by decreasing the anxiety of the claimant.

²⁹ In the context of the criminal justice system, screens must not prevent the witness from seeing, and being seen by the judge, jury, the legal representatives acting in the proceedings, and any interpreter or other person appointed to assist the witness.

C. Evidence in Private

Evidence in private involves clearing the courtroom of member of the public.³⁰ Applying this measure in the RDP, would ensure that FGM claimants could be interviewed separately, without the presence of male family members, to ensure that they can present their case. Such victims, as discussed in Chapter Two may not feel comfortable recounting their experiences in front of relatives, who may not know, and especially their own children who, frequently, will not have been told about allegations. As such, family members should be excluded from the hearing, and child-care facilities should be put into place so that claimants can make their claims in private and without the fear of dishonouring her family and community and the resulting alienation which may accompany such claims. This approach has been advocated for by the UNHCR³¹ and is discussed within each of the domestic gender-guidelines examined.³² However, some women may not want to be interviewed separately, and in some instances, it could be argued that mothers and fathers opposed to FGM united by the desire to protect their daughter(s) may prefer to be interviewed together. Thus, by categorising this provision as

³⁰ This measure provides for the exclusion from court, during the giving of the witness's evidence, of persons of any description specified in the direction other than the accused, legal representatives acting in the case, or any interpreter or other person appointed to assist the witness. However, such a direction may only be given where the proceedings relate to a sexual offence or it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.

³¹ UNHCR Gender Guidelines, *supra* note 11, at 9 (nothing that, "Women asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right").

³² See, Macklin A, "Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims" 13 Georgetown Immigration Law Journal 25, (1999) at 37. Within some societies, family members may alienate victims of sexual violence, viewing such violence as the woman's fault for failing to preserve her virginity or marital dignity. See also, Saso D, "The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines" 8 Hastings Women's Law Journal 263, (1997), at 274; INS Gender Guidelines, *supra* note 16, at 5-6; UK Gender Guidelines, *supra* note 16, Section 5.26 – 5.28. The Home Office Asylum Policy Instruction, also notes that, "Victims of sexual abuse may not feel comfortable recounting their experiences in front of relatives, who may not know, and especially their own children who, frequently, will not have been told about allegations. Applicants should be interviewed by themselves, especially in cases where a claim of sexual abuse has been made or it is considered to be a possibility. All applicants are advised in their letter of invitation not to bring their children to the interview but to make alternative arrangements. If their children do attend the interview, they will have to accompany the applicant in the interview room (assuming that no other adult relative is present). See, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, *supra* note 16, at 12.

a special measure, claimants are made aware of the fact that provisions are available for having their claim heard in private, and in tandem reinforces the ethos and procedural provisions enshrined within the examined gender-guidelines.

D. Video Recorded Evidence

This measure allows evidence to be submitted to the court in advance.³³ Within the proposed gender hearings, the use of video-recorded evidence would be paramount as it would enable the hearings, conducted by trained staff to occur in a relatively informal setting, thus making the process more accommodating for women. Furthermore, such video evidence would be accepted as her evidence-in-chief so that she does not have to repeat her story, and she would then be cross-examined if required via a video link rather than appearing in person. Thus, by easing the anxiety of the claimant, such evidence enables the decision-maker to see and hear a claimant, particularly a child claimant being interviewed at the time of her application for protection, and such evidence may provide more compelling and coherent evidence than that given in subsequent hearings. Such objective evidence will also be instrumental in identifying further training needs pertaining to good interviewing skills and how to treat claimants in a gender-sensitive manner.

E. Use of an Intermediary

This measure provides that an intermediary can be appointed by the court to assist a witness in giving evidence. The intermediary can explain questions or answers to be understood by the witness or the questioner but without changing the substantive evidence. Within the specialised refugee process, in addition to the use of interpreters, intermediaries should when requested be made available to provide assistance to FGM claimants, especially children and those claimants suffering from PTSD. Ideally

³³ The majority of young victims and witnesses within the criminal justice context will give their evidence through video recorded interview. *See*, Crown Prosecution Service, “*Special Measures*”, *supra* note 25.

intermediaries, will also speak the language of the claimant, however, this may not always be possible and in such instances allocated interpreters may also be employed to act as an interpreter between the claimant and the intermediary. This will be especially beneficial where intermediaries, such as psychologists, doctors or other expert personnel are used in this capacity. Intermediaries should ideally be individuals with a shown interest or expertise in issues pertaining to women, FGM, or gender-based violence in general. They should also be appointed based on the needs of the claimant where possible.

Procedural justice literature³⁴, has revealed that individuals given choice rather than coerced into situations respond better with greater satisfaction and with more motivation and effective performance.³⁵ Current special measures, namely the gender-guidelines, are not satisfactory or on a par with those facilities available in the specialised domestic violence courts. The examined case-studies need to consider better meeting the needs of FGM claimants where decision-makers consider that they need special measures to disclose traumatic or sensitive aspects of their claims. Not only will this empower claimants, it will also ensure that such necessary safeguards are employed which ensure that the law is balanced, proceedings are fair and that determinations, including credibility determinations are decided on sufficiently strong evidence.

IV. Credibility

As discussed in Chapter Three, emotion displayed during the recounting of experiences should not affect a woman's credibility. Decision-makers should understand that cultural and trauma play an important and complex role in determining behaviour.³⁶ The reluctance to disclose information, coupled with a lack of COI and physical evidence makes it easier for FGM claims to be discredited on credibility grounds. This is

³⁴See generally, Edwards I, "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making", 44 The British Journal of Criminology 967, (2004); Laxminarayan M, "Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type", 25 Social Justice Research 390, (2012) & Jackson JD, "Justice for All: Putting Victims at the Heart of Criminal Justice?", 30 Journal of Law and Society 309, (2003).

³⁵ Wincik B, "Civil Commitment: A Therapeutic Jurisprudence Model", Carolina Academic Press: Durham, NC, (2005).

³⁶ UNHCR Gender Guidelines, *supra* note 11, at 10.

compounded in instances where, decision-makers use late disclosure against claimants³⁷ and misuse available COI to undermine the credibility of claimants.³⁸

It is difficult to find any uniform approach to credibility assessments because it is so subjective and interview tactics vary from decision-maker to decision-maker.³⁹ Such variability in interview tactics is likely to produce inconsistency in results⁴⁰ and has contributed to the currently asylum lottery. In a gender sensitive FGM hearing open questions need to be asked. Without open questions, a claimant would be unlikely to take the initiative in describing the events that she believes are most important. The claimant would instead need to be able to provide specifically requested information, and the efficacy of the interview would become dependent on the accuracy of the interviewer's assumptions about what information is important.⁴¹ Arguably, the RDP needs a more systematic approach to determining which questions are relevant in FGM cases. As Herlihy argues,⁴² decision-makers need yardsticks by which to assess different approaches to credibility assessment, as well as a greater awareness of the logical steps that adjudicators take on their way to reaching credibility decisions. Through the use of special measures and consistent enforcement of the gender and credibility guidance discussed in chapter three, FGM claimants would have access to a fairer system and the inconsistency in similar cases may be reduced. Additionally, to be successful, there also exists a need for specific training (in gender and credibility issues) among decision-makers and their selection to panels based on their experience and expertise, including legal knowledge, psychological abilities, and experience in the field. Such expertise and training will effectively eliminate the risk of vicarious traumatization and make decision-makers more

³⁷ Decision-makers use late disclosure against an applicant's credibility, regularly disbelieving claimants who make such allegations, sometimes stating that they believe the applicant has made up the allegation to help their asylum claim. This is despite the UK Gender Guidelines for instance stating that, "If an applicant does not immediately describe information relating to her claim, this should not automatically count against her". See, UK Gender Guidelines, *supra* note 16.

³⁸ See, Amnesty International, "A Question of Credibility? Who So Many Initial Asylum Decisions are Overturned on Appeal in the UK", Still Human Still Here: UK, (2013).

³⁹ Kagan M, "Refugee Credibility Assessment and the "Religious Imposter" Problem: A Case Study of Eritrean Pentecostal Claims in Egypt", 43 Vanderbilt Journal of Transnational Law 1179, (2010), at 1230.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, at 1231.

⁴² Herlihy J *et al*, "Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study", 324 British Medical Journal 324, (2002), at 324.

aware of how cultural differences may be a particularly compelling problem in FGM-related cases.

V. COI

COI is required within the RDP as it provides ‘objective evidence’ indicating the plausibility of a claimant’s testimony, to help substantiate, assess and determine claims.

⁴³ Particular difficulties arise in substantiating women’s cases due to a lack of research in the field, and consequently a lack of awareness of issues affecting women and a lack of reference to women’s issues in COI materials. COI needs to have relevance to women’s claims, ⁴⁴ otherwise, vital information is missing which results in inadequate and inconsistent decision-making. This thesis and the examined FGM jurisprudence has revealed that there is a deliberate use of inadequate COI to justify credibility denials, ⁴⁵ and that there is insufficient usage of COI by decision-makers generally. ⁴⁶

In addition to the use of COI to discredit credibility, other issues which result in decision-makers relying upon inferior quality COI include: limited analysis due to time constraints; funding restrictions as a barrier to undertaking COI research; restricted internet access; and the inconsistent use of COI throughout every stage of the RDP.⁴⁷ Only by removing these barriers and employing good COI practice can decision-making

⁴³ Collier B, “*Country of Origin Information and Women: Researching Gender and Persecution in the Context of Asylum and Human Rights Claims*”, Asylum Aid: London, (2007), at 4.

⁴⁴ This would include: the position of women before the law; the political social and economic rights of women; the cultural and social mores of the country; consequences for non-adherence; the prevalence of harmful traditional practices including FGM; the incidence and forms of reported violence against women; and the protection available to them and any penalties imposed on those who perpetrate the violence.

⁴⁵ See, Immigration Advisory Service, “*The Refugee Roulette: The Role of Country Information in Refugee Status Determination*”, (2010), available online via the UNHCR Ref World website at <http://www.unhcr.org/refworld/docid/4b62a6182.html>, (last accessed 24/7/17) (hereafter referred to as the COI Report). An Executive Summary of the COI Report is also available online at http://www.ecoi.net/file_upload/90_1264501167_ias-refugee-roulette-2010-executive-summary.pdf (last accessed 24/7/17) (hereafter referred to as the COI Executive Summary).

⁴⁶ Persistent problems as identified in the case-law and reaffirmed in the COI Report concerned selective quoting, speculative argument and reliance on outdated sources. See, COI Executive Summary, *supra* note 45, at Methods of Use of COI within the Determination Process.

⁴⁷ *Ibid*, at Barriers and Facilitators to Using COI. Such constraints, which can be time consuming, also inadvertency can dissuade both decision-makers and legal representatives from undertaking any in-depth research investigations, or conducting any further research or analysis.

improve. This can be achieved firstly by utilising superior quality COI information⁴⁸ within an independent documentation centre and secondly by using advanced Information Technology (IT). Whilst the case-studies have their own dedicated COI services,⁴⁹ in the current economic climate, coupled with human and financial restraints, claimants and legal representatives may lack time and resources to research the political, legal, human rights and humanitarian situations that force people to flee their homes and seek protection. In addition to been made aware of the different COI experts offering objective evidence on individual claims for refugee status,⁵⁰ the thesis posits that a specialist team within the dedicated COI services dealing with gender issues solely be established. Such an initiative, in a similar fashion to the role of the resource co-ordinator within the New York Domestic Violence court, would be responsible for collecting information, compiling reports, conducting field work research and producing the highest quality COI. Co-ordinated by a resource co-ordinator, staff would be trained in the use and provisions of the gender-guidelines and through conducting in depth analysis and completing case specific research requests, decision-makers and legal representatives will observe a far superior, systematic and individualized use of COI.

Another innovation from the specialised domestic violence courts which could be replicated to a degree within these centres is the use of advanced IT. Advanced IT applications, such as the Domestic Violence Court Technology Application Resource Link, discussed in Chapter Four, facilitates the transfer of critical information between the domestic violence court and a variety of other agencies involved in the case. A similar software application could be used to facilitate the transfer and accessing of additional

⁴⁸ In establishing a framework of quality criteria which constitutes acceptable COI, the following factors should be taken into account: up to date information; information which is as factual as possible within its proper historical context; referenced and retrievable information; balanced, reliable and objective information; information written by an organisation or expert; and finally, succinct academic pieces of research should also be used. But recognising the value of country research and what constitutes 'quality information' is just one element; undertaking it is another. Although the advent of the internet has made it easier to access such information, the challenge for many involved in the determination process lies in knowing what to look for to begin with and how to pick and choose from among the plethora of potential sources which currently exist.

⁴⁹ For further information on the Canadian IRB Documentation Centre, the Country Information and Policy Unit of the Home Office, and the US Resource Information Centre, please refer to their respective websites.

⁵⁰ See, Rights in Exile Programme, "*Country of Origin Information Experts*", (2017). This report is available online via the Rights in Exile Programme website at <http://www.refugeelegalaidinformation.org/country-origin-information-experts> (last accessed 23/7/17).

COI gender-based information from other documentation centres. This would ensure heightened communication and the provision of all the necessary information prior to FGM determinations and would undoubtedly encourage better decision-making. As reliable information on women is difficult to obtain, there remains the possibility that information on specific countries may not include information on FGM. Consequently, decision-makers may assume that FGM is not an issue and denied refugee status. A coordinated software application implemented by several determination centres can provide information on a specific country of region which another cannot find. Collaboration among the case-studies in respects of accessing information may be a particularly useful tool in respects of ensuring that comprehensive and reliable information on FGM is obtained and presented in a gender-sensitive manner. This development would give credibility to the gender-guidelines, contribute to a process which accommodates the specific needs of women and encourage collaboration among different countries to ensure that the claims of FGM claimants are fully investigated. Arguably, the use of such a system will further help in appeal cases as the research history of decision-makers, legal representatives and other interested parties could be scrutinised.⁵¹ The ability to identify limited usage and analysis of COI, is instrumental firstly in rooting out bias and holding individuals accountable for failing to implement the gender-guidelines; and secondly in identifying the training needs of individuals in researching, accessing and analysing COI information.⁵²

VI. Training and Education

As discussed throughout the thesis, decision-makers often do not understand either the psychological dynamics of relationships involving domestic violence or the obstacles facing women seeking protection.⁵³ To remedy this discrepancy, such individuals need to

⁵¹ This is assuming that such specialised software would be accessible only to interested parties via a subscription which would be both username and password protected.

⁵² Such training should consist of the following: Research Skills; Internet Skills; Source Assessment Skills; Analysis Skills; Thematic Research Skills and information, in particular on FGM issues; Country specific research information; Instructing Experts; Presenting data clearly; and General COI Courses.

⁵³ In addition to failing to understand the complexities of leaving abusive and discriminatory relationships, untrained court personnel and judges can and do misinterpret victim behaviour that is symptomatic of the

receive the education and training necessary to adequately perform their jobs.⁵⁴ Education can be a highly effective tool for reclaiming judicial neutrality.⁵⁵ As discussed in Chapter Four, victims need to understand what has happened and the impact it has had on them. They need sympathy and understanding, not blame. The specialised domestic violence courts ensure that all individuals with whom a victim will come into contact with will receive training to sensitize them to these needs and how to meet them. Some of the best practices emanating from these courts will now be examined. It is envisaged that these innovations can be easily transposed into the RDPs of the case-studies so that FGM claims can similarly be treated in a gender-sensitive and accommodating manner.

All participants in the judicial/quasi-judicial process, including the RDP need to understand the distinct types of psychological damage that being victimized by crime can produce. All need to learn how to act in ways designed to facilitate their amelioration rather than their exacerbation. The training they currently receive includes sessions conducted by psychologists or social workers designed to increase their sensitivity to these issues and to the dos and don'ts of victim interaction. This includes theoretical understanding, but also skills training including modelling and role-play exercises. Training also covers the more esoteric psychological reactions that crime victimization may produce. Individuals are encouraged to understand that those victimized by crime can experience a feeling of loss of control in their lives that can produce serious psychological consequences, which does not necessarily indicate a lack of credibility as some FGM decision-makers have wrongly determined.

psychological trauma induced by extended abused. Thus, refugee decision-makers are equally guilty, as highlighted in the case-law, of failing to recognise that victims of FGM and other violence may actually be suffering from PTSD, whereby many victims may be suffering from symptoms such as: hyperarousal (being in a constant state of alertness for and expectation of danger); intrusion (reliving the violence experience as if it were constantly occurring in the present, through flashbacks and nightmares); and dissociation (a numbing response that includes repressing memories of violent incidents). These symptoms can affect how a victim acts and how they are perceived by decision-makers. In fact, as discussed in chapter three the effects of PTSD may be perceived by decision-makers as signs of dishonesty and some FGM claimants are therefore denied refugee status because decision-makers find them to lack credibility.

⁵⁴ Virtually every study of court response to domestic violence reference in this thesis has recommended judicial training as a necessary remedy to existing systemic problems. *See for example*, Kinports K & Fischer K, "Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of The Reform Statutes", 2 Texas Journal of Women & Law 163, (1993), at 210-12.

⁵⁵ Epstein D, "Effective Intervention in Domestic Violence Cases: Rethinking the Role of Prosecutors, Judges, and the Court System", 11 Yale Journal of Law & Feminism 3, (1999), at 44.

To the extent that victims suffer from a form of PTSD, decision-makers and those involved in the legal proceedings should encourage them to “open up” about their experiences and how they feel about them.⁵⁶ According to Winick, this could be accomplished by designing intake and other processing forms to enable victims to write out a description of what occurred to them and what feelings they experienced.⁵⁷ Whilst some victims will have language or literacy deficits that will make writing difficult, others, because of their cultural background, will be reluctant to put their statements in writing. This will always be an issue within the RDP as the majority of FGM claimants will not speak or write in the language of their host country. For these and perhaps other victims who might find a writing requirement objectionable, a court official should be appointed to explain the process and help them fill in such forms.⁵⁸

When interviewing domestic violence victims, the police, and court officials are encouraged to be understanding and to make victims aware that sometimes even testifying in court about their story may have a healing effect.⁵⁹ Domestic violence victims can be reluctant to proceed based on fear of having to confront their perpetrator. Indeed, such a confrontation may provoke high stress, anxiety, and fear, causing the victim to relive the emotional trauma of the crime. To relieve the victim’s apprehension, and to reduce the psychological pain and distress it might produce, police and prosecutors can suggest that alternative approaches, including the use of special measures, might be possible and may not violate the defendant’s right to confront the witnesses against him. Similarly, whilst FGM victims do not have the fear of facing their perpetrators, they are nevertheless subject to fear and re-traumatization by having to recount their experiences to decision-makers, especially male decision-makers. Arguably, in applying the gender-guidelines if female decision-makers are unavailable, to reduce the psychological pain and distress of being interviewed by males, similar alternative approaches should be implemented.

Victims of domestic violence often experience the criminal justice process as coercive. According to the procedural justice literature, individuals given choice rather

⁵⁶See, Pennebaker, *supra* note 22.

⁵⁷ Winick B, “*Therapeutic Jurisprudence and Victims of Crime*”, (2008), at 5. This paper is available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102350 (last accessed 24/7/17).

⁵⁸*Ibid.*

⁵⁹ Mills, L. G., “*Killing her softly: Intimate abuse and the violence of state intervention*”, 113 *Harvard Law Review* 550, (1999), at 575.

than made to feel coerced, respond better, with greater satisfaction and with more motivation and effective performance.⁶⁰ Experiencing choice and a sense of self-determination is often vital to an individual's sense of her own locus of control and may be essential to emotional well-being.⁶¹ Arguably, by promoting safeguards which empower victims, this can help to ameliorate their psychological stress and restore their emotional equilibrium. Victims of FGM similarly, coupled with a foreign legal process, and additional social, cultural and linguistic barriers, also need to feel that they are being respected and have some control over the process which they find themselves in. By empowering claimants and making them aware of what is occurring and what they need to do to ensure that their refugee claims succeed, like domestic violence victims they too may respond better, with greater satisfaction and with more motivation and effective performance throughout their hearings. Consequently, decision-makers and court personnel also need training in how to be good listeners and to convey sympathy, empathy, and understanding. This will increase victims' trust and confidence in these officials.

Much of the distress experienced by domestic violence victims in the criminal justice process relates to their failure to understand how the process works and why. They may not understand the various stages of the process, and the inevitable delays that will occur. This lack of understanding can further contribute to their anxiety, fear, and depression. The remedy, as invoked within the domestic violence courts is for all criminal justice personnel to provide victims with increased information about the process and to express a willingness to answer their questions. This is described in the social cognition literature as "information control".⁶² Understanding the process will reduce victims' stress, fear, and anxiety, and help them to manage their expectations concerning what will occur. Such information can be provided orally, through written materials, or through offering the

⁶⁰See, Wincikk, *supra* note 35.

⁶¹ Winck B, "*Therapeutic Jurisprudence Applied: Essays on Mental Health Law*", Carolina Academic Press: Durham, NC, (1997), at 68-83; Winck B, "*On Autonomy: Legal and Psychological Perspectives*", 37 *Villanova Law Review* 1705, (1992), at 1755-68.

⁶² Fiske, S. T. *et al*, "*Social Cognition*", Addison-Wesley Publishing Company: Reading, MA, (1984), at 122; Sydeman S *et al*, "*Procedural Justice in the Context of Civil Commitment: A Critique of Tyler's Analysis*", 3 *Psychology, Public Policy & Law*, (1997), at 211.

victim the opportunity to view a videotape orientation to the criminal process. Such a reform could easily be transposed into the RDP.

Like the domestic violence courts, all personnel within the RDP need to be trained in gender issues and procedures. In this way, one would hope that there would be cross-pollination between the various cogs in the wheel so that the process can smoothly run in a gender-sensitive manner. Attitudes may not change as a result; however, by instituting gender-sensitive training for all aspects of the procedure the roots by which the old biases could negatively impact decisions should be effectively curtailed.

In respects of expertise, decision-makers should be selected according to their abilities and expertise, particularly in relation to the applicable law and gender issues. This expertise should cover the following areas: (1) legal knowledge – refugee law, immigration law, human rights law, conduct of judicial hearings, how to access evidence, how to write decisions, and how to interact with claimants and counsel; (2) experience in the field – work in countries torn by war or internal strife, work with refugees and displaced persons, sensitivity to the dynamics involved in working with individuals from other cultures; and (3) psychological abilities – capacity to bear the suffering of all individuals, including themselves, and experience in dealing with traumatised individuals. Naturally, it is unrealistic to expect decision-makers to be exceptional in all areas, but it would be important for them to show skills and experience in all three, with some degree of excellence in one or two. Only then, “would they be confident enough and command enough respect to use the position of authority that they hold in order to impose standards of quality on the behaviour of all other actors”.⁶³ These skills are the basic skills which need to be possessed by decision-makers. They also need to be supplemented by specialised gender-training to ensure that FGM and other gender-based claims are assessed fairly and in a gender-sensitive manner.

Judicial education coupled with increased exposure to the issue through extended assignments to a domestic violence court, has been utilised within the specialised domestic violence courts. Training has rooted out biases, helped to change attitudes and

⁶³ Rousseau C *et al*, “*The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*” 15 *Journal of Refugee Studies* 43, (2002), at 66-7.

victim protection is prioritised. The RDP can learn from these innovations. Gender-based training within the RDP, needs to deal with the application and interpretation of the respective gender-guidelines and to ensure that the guidelines are applied and interpreted in a gender-sensitive manner. Training must also be targeted towards the eradication of existing anti-victim, anti-women, anti-racial and anti-gender biases within a larger framework of promoting procedural and gender justice. To give credence to the gender-guidelines and to ensure that FGM victims obtain the safeguards to which they are entitled, extensive reforms to match those in respect of domestic violence must now be implemented within the RDPs of the case-studies. Such reforms will ensure that FGM is recognised as a criminal as opposed to a cultural practice and assist in the remedying of disparities in the protection afforded to female refugee claimants.

VII. Victim Support and Guidance

Evidence from the specialised domestic violence courts have revealed that the use of independent domestic violence advocates⁶⁴ are invaluable in the work of the court and as part of the co-ordinated community response to domestic violence. The review, and is evident from the examination of the courts, found that witnesses and victims are more likely to attend court if they are supported by an IDVA.⁶⁵ Advocates can contribute to increased victim safety and satisfaction and maintain victim engagement with the court.⁶⁶ As with the specialised courts, it is strongly recommended that a gender violence advocate service should be implemented within the RDP. Advocates within these services should have passed an accredited course that equips them to deal with FGM and other forms of gender-based violence. They should work with claimants from the initial point of contact. Like the IDVAs, they can assess risk and tailor their services to respond to the risks and needs of the claimant, including language, medical, social and basis needs. IDVAs work

⁶⁴ Hereafter referred to as IDVAs. *See also*, Specialist Domestic Violence Courts Review 2007-8, Section 6 as cited in Valji & De La Hunt, *supra* note 7, at 31.

⁶⁵*Ibid.*

⁶⁶*See*, Robinson A, “*The Cardiff Women’s Safety Unit: A Multi-Agency Approach to Domestic Violence*”, Cardiff University, (2003). This report is also available online at https://www.researchgate.net/publication/251416613_The_Cardiff_Women%27s_Safety_Unit_A_Multi-Agency_Approach_to_Domestic_Violence (last accessed 23/7/17).

within a multi-agency setting and involve other agencies when required. They are trained to understand the value and legal requirement of information-sharing and, as such, are integral to the specialised courts. A gender violence advocate service, like the IDVAs should be independent of other agencies' agenda so that they can focus on the needs of the claimant and offer impartial advice.

From a victim's perspective, the IDVA offers a main contact point through the many different agencies and processes they may need to access. The IDVA identifies sources of help and safety, explains the processes and supports the client to get the help they need both through their work with the client and through their relationships with other agencies. These relationships are best embodied in protocols for referrals and information-sharing. Such an approach could be easily transposed within the RDP. According to Valji and De La Hunt the best specialised domestic violence courts recognised that the IDVAs' support of witnesses coming to court was essential to the success of the court.⁶⁷ They found that specialised courts that has IDVAs with a focus on court work had more successful prosecutions than those where IDVAs did not focus on court work.⁶⁸ Advocates within a gender violence advocate service, like the IDVAs can be a key point of contact for FGM claimants throughout the entire RDP. Due to the independent nature of their role, advocate can work with claimants from their initial application, through the RDP and after if needed. Working with other agencies, they can help find interpreters and help to co-ordinate objective evidence in support of claims, including liaising with dedicated COI services, human rights groups and legal representatives. They can also help with removing language barriers, childcare issues and medical support services if deemed necessary.

IDVAs have also played a role in improving the court system and successful domestic violence courts felt that IDVAs should be involved in training, planning, operation and performance reviews to ensure that victim safety was not compromised by the systems put in place.⁶⁹ Such an approach within the RDP would help to ensure that FGM claimants have their cases heard within a gender-sensitive process with support and confidence.

⁶⁷ Valji & De La Hunt, *supra* note 7, at 32.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, at 33.

Conclusion

For a system to be fair and open, it needs to be supported by physical and human resources that are well established within a system based on cultural integrity.⁷⁰ The combination of these elements is the basis of a fair and open process for FGM claimants. This needs to be supported through the publication of rules and guidelines, standardized and clear written information, free access to legal advice and representation, access to COI, and an impartial body to decide appeals. A fair procedure should be followed by all interested parties to protect claimants' basic human rights, such as life, liberty, equal treatment, and equity. This is exactly, what the recommendation in this thesis hope to achieve.⁷¹ Increased accountability within this co-ordinated response to gender-based violence and an on-going expansion of already existing standards (including the use of gender-guidelines) must also complement any approach to FGM to address the needs of claimants and offer viable protection. Specialised gendered courts/hearings can achieve this. This approach would firstly give further credibility to the domestic court's hard-nosed approach to domestic violence. Secondly, it reinforces the recognition of FGM as a form of persecution. Thirdly, it would encourage the use of gender-guidelines and demand training and specialisation among decision-makers and other relevant personnel. Finally, such courts/hearings based on the domestic violence models examined will address the needs of claimants and potentially redress inadequate quality decision-making and inconsistency of FGM asylum decision. In conclusion, the evidence examined throughout the thesis suggests that victims of FGM are not being treated in a gender-sensitive manner. To effectively implement the reforms proposed in this chapter, a coordinated gendered system is needed. Like the approach adopted by the domestic violence courts and initiatives such as the Legacy Gender Integration Group mentioned in Chapter Four, the implementation of new laws, policies and processes when paired with the development of a coordinated strategy, ensures all interested parties respond in a consistent way to violence against women and can be held accountable. By dedicating part of the RDP to

⁷⁰ Pacífico A, "A Network Society Communicative Model for Optimizing the Refugee Status Determination (RSD) Procedures", 56(1) *Revista Brasileira de Política Internacional* 22, (2013), at 30.

⁷¹ *Ibid.* See also, Alexander M, "Refugee status determination conducted by UNHCR", 11 *International Journal of Refugee Law* 251, (1999), at 286-7.

gender-based violence, it sends a message to the world that violence against women will not be tolerated, even those forms of violence cloaked in the shroud of culture.

Appendix A:

Table 2: Organizations Contacted in the Early Stages of Research

Name of Organization	Date	Main Findings	Influence on Research
Centre for Gender and Refugee Studies (US)	30/4/09 – 15/3/11	<p>Following information requests pertaining to FGM as a basis for refugee status and on the US asylum system, I was contacted by the managing attorney Lisa Frydman & the Director Karen Musalo</p> <p>They provided me an in-depth analysis of the US Court and Asylum system. Furthermore, I was furnished with a number of relevant cases to examine and provided with information on the construction and application of the PSG in gender-cases.</p>	<p>The information provided was of the uttermost importance and formed the basis for many of the discussions in the thesis.</p> <p>Specifically, it revealed that disparate outcomes are evident in gender-related and FGM cases irrespective of similarities.</p> <p>In the US, the PSG category is applied very narrowly these days, whether gender is the issue or not. PSG cases have become increasingly difficult to win. Gender-based cases have been affected by this.</p>

		<p>She also revealed that it difficult to find claimants to speak about their experiences of FGM and their experiences within the RDP.</p> <p>Lisa further confirmed that in her experience gender guidelines are not routinely used and that immigration judges are not trained in their use and content.</p>	<p>The reluctance of claimants to speak about the violence they suffered and their experiences within the RDP further reinforced the need to look for ways to make the RDP gender-sensitive i.e. training, female personnel etc</p>
Cherish Others in Kenya	6/11/08	<p>Initially received positive response to email requests for information on the practice of FGM.</p> <p>However, promised reports were never received.</p>	<p>Information on their website, proved influential in helping me understand the practice of FGM, its prevalence, health consequences and some of the justifications for the practice.</p>
Foyle Woman's Aid	7/2/07	<p>Communication was made with the Centre in the hope of speaking to some</p>	<p>Influential in enhancing my understanding of the aims and objectives of</p>

		<p>victims of domestic violence who had experience of the specialised domestic violence courts.</p> <p>Unfortunately, this was not a possibility as some women were unwilling and others due to childcare etc were unable to meet me.</p> <p>I was however provided with a wealth of information on the role of the organisation within the Specialised Domestic Violence Courts and the role of victim advocates.</p>	<p>the specialised domestic violence courts.</p> <p>Specifically, I came to recognise FGM as a specific form of domestic violence.</p> <p>I determined that the protective mechanisms implemented within the specialised courts could be transposed into the RDP to help victims of FGM have access to a fair, accommodating and gender-sensitive decision-making process.</p>
Canadian Council for Refugees	7/5/2009 – 21/9/15	Various requests were made over several years to obtain information on the issue of FGM as the basis for refugee status within Canada.	Information and updates on cases was influential in helping to understand what areas of reform were need within the RDP.

		<p>I have been met with numerous no responses and on the two occasions that information was provided it was very general. I was merely told to refer to the IRB website, as well as CanLII and RefLex for relevant cases.</p> <p>I was informed that it is difficult to get information on specific FGM and other gender-based cases that have not been made public because of privacy concerns.</p>	<p>More specifically, this organisation confirmed for me that many gender-based cases and statistics are not made public in order to protect the sovereignty of the State so as not to open the floodgates to others in a similar position as those already granted refugee status.</p> <p>From the cases which I was able to examine, they helped to clarify my belief that there is a need for better training, access and accountability of legal advocates.</p> <p>The fact that many decisions are unavailable due to privacy concerns also prevented me from being able to adequately see how the gender</p>
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			guidelines were used (if at all) in such cases.
UNICEF Ireland	18/11/07	Following an information request for information on the subject of FGM as a basis for refugee status, I was provided with a number of links which provided me with some background information on the subject.	<p>The information provided was limited to background information on the practice of FGM generally.</p> <p>I was surprised at how little information there was on the subject of gender-based violence and the implications of seeking refugee status.</p>
Irish Refugee Council	Oct 07 – Aug 09	Over this period of time, Emma Carey a legal assistance within the organisations provided me with information on FGM and country of origin information pertaining to Nigeria. She also provided me with a number of relevance cases and other information relating to my research which she through was beneficial.	<p>Information and updates on cases was influential in helping to understand what areas of reform were need within the RDP.</p> <p>More specifically, this organisation confirmed for me that many refugee cases, including domestic violence cases and statistics are not made public in order to protect the sovereignty of the State so as not to open the floodgates to</p>

			<p>others in a similar position as those already granted refugee status.</p> <p>To aid in my understanding of how victims of gender-based violence are treated within the RDP, the Council encouraged me to contact AkiDwa.</p>
AkiDwa	19/11/08	<p>I made contact with this organisation which had been established in 2001 by a group of African women to address, isolation, racism and Gender.</p> <p>I was advised that due to the sensitive nature of FGM, it would not be possible to speak with victims. I was however, directed to information on their website and provided with general information on</p>	<p>The information provided, reinforced to me the need for sensitivity when dealing with victims of gender-based violence. It made me aware of the need for a gender-sensitive approach within the RDP.</p> <p>Specifically, the discussions had enlightened me to understand that reforming the refugee definition was not the solution. Reform of the</p>

		gender-based violence, and the treatment of victims within the RDP.	RDP itself was more important for claimants.
Foley & Lardner LLP Washington Harbour 3000 K Street, NW Washington, DC 20007	2/12/2008	In the midst of my research looking for current FGM/refugee claims I came across this legal firm in the US. They were dealing with an Ethiopian asylum case in which (1) FGM (2) potential firm resettlement in South Africa and Botswana were key issues. Unfortunately, despite several requests for information on the case, I received no correspondence.	Whilst, I received no correspondence to my information requests, the fact that the lawyer in the case was actively looking for contacts for experts on FGM or country experts for Ethiopia, South Africa or Botswana, helped to inform my understanding of what is needed of advocates in terms of research, evidential requirements and the need for country of origin information.
Office of the Refugee Appeals Tribunal (Dublin)	1/5/09	Sought information and access to decisions pertaining to gender-based claims. Was informed that only legal	The fact these decisions are not available to all researchers reinforced my floodgates argument. It further revealed the need for better training, access

		representatives and their researchers can access these decisions.	and accountability of legal advocates.
Home Office UK		<p>Sought information and access to decisions pertaining to gender-based claims.</p> <p>Was informed that only legal representatives and their researchers can access these decisions.</p>	<p>Whilst, some decisions were available online, the fact that so many are not accessible to the public again reinforced my floodgates argument. It further revealed the need for better training, access and accountability of legal advocates.</p> <p>The lack of information also prevented me from being able to adequately see how the gender guidelines were used (if at all).</p>
Nicole Loughran Solicitor Livingstone Brown Solicitors 84 Clarton Pl Glasgow G5 9TD	4/5/09	Through her work as a solicitor in the field, Nicole had come across the subject of FGM as a basis for refugee status. She wrote and published work on the subject.	The information provided reinforced my opinion that the reasons given by the Immigration and Asylum Tribunal in the UK for continually dismissing asylum appeals based on FGM

		<p>She spoke with me briefly on her own understanding of the subject and send me a copy of work which she had written on the subject. She too felt that decisions were inconsistent and not in line with other jurisdictions.</p>	<p>were inconsistent and out-of-step with other jurisdictions.</p> <p>She also clarified that it is difficult to obtain gender-related statistics and that most decisions are not widely available. Again, this raised questions over training, use of the guidelines and issues of cultural relativism within the decision-making process itself.</p>
Save the Children UK	7/5/09	<p>Following an information request for information on the subject of FGM as a basis for refugee status, I was provided with a number of links which provided me with some background information on the subject.</p> <p>Further requests for additional information</p>	<p>The information provided was limited to background information on the practice of FGM generally.</p> <p>It nevertheless provided me with information which I used in the thesis to help me understand the complexity of defining gender-based violence and the relevance of</p>

		were met with an automated reply informing me that someone would respond to my request in due course. No further information was received.	FGM, especially in Western States.
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Appendix B:

FGM as a Recognised Human Rights Violation

Several treaties, General Comments/Recommendations of treaty monitoring bodies, and consensus documents explicitly condemn FGM as a human rights violation. Other core human rights treaties of the United Nations and African Union provide general protections for the human rights of women and girls, which have been interpreted to prohibit FGM. Many of the sources of international law that are most frequently referenced to end FGM are listed in Appendix B, though this list is not exhaustive.

A. International Law Source Documents

Two regional human rights treaties explicitly condemn FGM as a human rights violation.

- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted 11 July 2003; Entered into Force 25 November 2005.
- Council of Europe Convention on preventing and combating violence against women and domestic violence. Adopted 11 May 2011; Entered into Force 1 August 2014.

Several United Nations human rights treaty monitoring bodies have explicitly condemned FGM as a human rights violation.

- Committee on the Elimination of All Forms of Discrimination against Women. General Recommendation No. 14 on Female circumcision under the Convention on the Elimination of All Forms of Discrimination against Women. 1990.

- Committee on the Elimination of Discrimination against Women. General Recommendation No. 19 on Violence against women under the Convention on the Elimination of All Forms of Discrimination against Women. 1992.
- Committee on the Elimination of All Forms of Discrimination against Women. General Recommendation No. 24 on Article 12 (Women and health) of the Convention on the Elimination of All Forms of Discrimination against Women. 1999.
- Committee on the Rights of the Child. General Comment No. 4 on Adolescent health and development under the Convention on the Rights of the Child. 19 May-6 June 2003.
- Human Rights Committee. General Comment No. 28 on Article 3 (Equality of rights between men and women) of the International Covenant on Civil and Political Rights. 29 March 2000.
- Committee on Economic, Social and Cultural Rights. General Comment No. 14 on Article 12 (The right to the highest attainable standard of health) of the International Covenant on Economic, Social and Cultural Rights. 25 April-12 May 2000.

Several United Nations consensus documents have explicitly condemned FGM as a human rights violation.

- Transforming our World: The 2030 Agenda for Sustainable Development. General Assembly Resolution A/RES/70/1. 25 September 2015.
- General Assembly Resolution 67/146, Intensifying global efforts for the elimination of female genital mutilations. 20 December 2012.

- General Assembly Resolution 48/104, Declaration on the Elimination of Violence against Women. 20 December 1993
- Beijing Declaration and Platform for Action of the Fourth World Conference on Women. 4-15 September 1995.
- Programme of Action of the International Conference on Population and Development. 5-13 September 1994.
- Commission on the Status of Women Resolution 51/2 on Ending of Female Genital Mutilation. 26 February-9 March 2007.

B. Other Human Rights Instruments

Several other core international and human rights treaties generally protect women's and girls' human rights, including protection from FGM.

- Convention on the Elimination of All Forms of Discrimination against Women. Adopted 18 December 1979; Entered into force 3 September 1981.
- Convention on the Rights of the Child. Adopted 20 November 1989; Entered into force 2 September 1990.
- International Covenant on Civil and Political Rights. Adopted 16 December 1966; Entered into force 23 March 1976.
- International Covenant on Economic, Social, and Cultural Rights. Adopted 16 December 1966; Entered into force 3 January 1976.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted 10 December 1984; Entered into force 26 June 1987.
- African Charter on Human and Peoples' Rights. Adopted 27 June 1981; Entered into force 21 October 1986.
- African Charter on the Rights and Welfare of the Child. Adopted 1 July 1990; Entered into force 29 November 1999.

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